TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 574.

WARREN F. PUTNAM, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

FILED MARCH 28, 1895.

(15,847.)

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INDEX.

	Original.	Print.
Writ of error	*a*	1
Return of circuit court thereon	*b*	1
Caption	1	2
Judgment and sentence	1	2
Warrant to commit under second count	3	3
Warrant to commit under seventh count	5	4
Order for supersedeas	7	5
Marshal's return on warrant to commit under second count	8	5
Marshal's return on warrant to commit under seventh count	9	6
Order for bail pending writ of error	10	6
Bail bond	11	7
Bill of exceptions upon sentence	14	8
Statement	14	8
Sentence	15	9
Motion that sentence to confinement in jail be imposed	17	10
Motion that sentence already passed be modified	18	10
Allowance of bill of exceptions	18	11
Clerk's certificate	19	11
Petition for writ of error	20	12
Assignment of errors upon sentence	21	12
Citation	25	15
Proof of service of citation	26	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1895.

a UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, in a cause entitled United States *v.* Warren F. Putnam, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to
b the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twentieth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal of Circuit Court, New Hampshire.]

FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States,
District of New Hampshire.

Allowed by—
EDGAR ALDRICH,
Presiding Judge at the Trial before the
Circuit Court of the United States for
the District of New Hampshire.

CIRCUIT COURT OF THE UNITED STATES, *District of New Hampshire,* } *ss*:

And now here the judges of the circuit court of the United States for the district of New Hampshire make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested — of the record and proceedings in the suit within mentioned, on and after judgment, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of Circuit Court, New Hampshire.

In testimony whereof I, Fremont E. Shurtleff, clerk of said circuit court of the United States in and for the district of New Hampshire, have hereto set my hand and the seal of said court this fifth day of March, A. D. 1895.

FREMONT E. SHURTLEFF, *Clerk.*

1 UNITED STATES OF AMERICA, } ss:
District of New Hampshire, }

At a circuit court of the United States for the first circuit, begun and holden at Concord, within and for the district of New Hampshire, on Monday, the eighth day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Before the Honorable Edgar Aldrich, district judge, presiding.

THE UNITED STATES }
v. } No. 479, Criminal Docket.
WARREN F. PUTNAM. }

This cause was begun by indictment in the district court of the United States within and for the district of New Hampshire and was duly remitted to this circuit court and entered at the present term thereof; and it appearing that the defendant, Warren F. Putnam, plead not guilty to the indictment, he is tried by a jury of twelve men, duly sworn according to law to try the issue, and a verdict is rendered into court of not guilty on the first, fourth, sixth, ninth, and tenth counts and guilty on the second and seventh counts.

Whereupon, to wit, on the thirty-first day of January, A. D. 1895, the following sentence is entered:

Sentence.

(Entered Jan. 31, 1895.)

2 Upon the verdict under the second count of the indictment it is ordered that the respondent be imprisoned in the State's prison at Concord for the period of five years, and while imprisoned in the State's prison at Concord he shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State's prison is situated, and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State and stand committed till sentence be performed.

Upon the verdict under the seventh count it is ordered that respondent be imprisoned at the State's prison in Concord for the term of five years, and while so imprisoned in the State's prison at Concord he shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State's prison is situated, and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State and stand committed till sentence be performed.

Ordered that the imprisonment under the seventh count be concurrent with the imprisonment under the second count.

And on said thirty-first day of January it is ordered that warrants

to commit be not issued until the fifth day of February, A. D. 1895, and meanwhile that the respondent remain in the custody of the marshal; and thereafter, to wit, on the fifth day of February, the following warrants to commit were issued:

Warrant to Commit under Second Count.

To the marshal of our district of New Hampshire or either of his deputies and the warden of the State's prison in our said district, Greeting:

These are, in the name of the President of the United States of America, to command you, the said marshal or deputies, and each of you forthwith to convey and deliver into the custody of the warden of the State's prison at Concord the body of Warren F. Putnam, who hath been convicted in our circuit court of the United States for the first circuit, now holden at Concord, within and for the district of New Hampshire, of the crime of abstracting and converting to his own use certain funds and credits of the property of a certain national banking association at Exeter, in said district, then and there known and designated as the National Granite State bank, which said association had been theretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking business at said Exeter under the laws aforesaid, to wit, sixteen bonds and written obligations of the Leavenworth Electric Railway Company, of the kind called six per cent. first-mortgage gold bonds, of the denomination and value of one thousand dollars each; eight bonds and written obligations of the Leavenworth Electric Railway Company, of the kind called six per cent. first-mortgage gold bonds, of the denomination and value of five hundred dollars each, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and
4 provided, for which offense he hath been, to wit, on the 31st day of January, A. D. 1895, sentenced by our said court "to be imprisoned in the State's prison at Concord for the period of five years, and while imprisoned in the State's prison at Concord he shall be in all respects subject to the same discipline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State's prison is situated, and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State and stand committed till sentence be performed," as appears by indictment and of record in said court.

And you, the said warden, in the name of the President of the United States aforesaid, are hereby commanded to receive the said Warren F. Putnam into your custody in said State's prison and him there safely to keep until this sentence is performed or he is otherwise discharged in due course of law.

Hereof fail not at your peril.

Witness the Honorable Melville W. Fuller, at Concord, this fifth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

[L. S.] FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States for the District of New Hampshire.

5 *Warrant to Commit under Seventh Count.*

To the marshal of our district of New Hampshire or either of his deputies and the warden of the State's prison in our said district, Greeting:

These are, in the name of the President of the United States of America, to command you, the said marshal or deputies, and each of you forthwith to convey and deliver into the custody of the warden of the State's prison at Concord the body of Warren F. Putnam, who hath been convicted in our circuit court of the United States for the first circuit, now holden at Concord, within and for the district of New Hampshire, of the crime of abstracting and converting to his own use the monies, funds, and credits of the property of a certain national banking association at Exeter, in said district, then and there known and designated as the National Granite State bank, which said association had been theretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking business at said Exeter under and by virtue of the laws aforesaid, to wit, forty thousand dollars of the monies, funds, and credits of said association, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided, for which offense he hath been, on, to wit, the thirty-first day of January, 1895, sentenced by our said court "to be imprisoned at the State's prison in Concord for the term of five years, and while so imprisoned in the State's prison at Concord he shall in all respects be subject to the same disci-
6 pline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State's prison is situated, and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State," as appears by indictment and of record in said court, and stand committed until sentence be performed." It is ordered that the imprisonment under the seventh count of the said indictment (under which count this warrant to commit is issued) be concurrent with the imprisonment under the second count (under which count a warrant to commit is issued under the same date as this warrant to commit).

And you, the said warden, in the name of the President of the United States aforesaid, are hereby commanded to receive the said Warren F. Putnam into your custody in said State's prison and him there safely to keep until this sentence is performed or he is otherwise discharged in due course of law.

Hereof fail not at your peril.

Witness the Honorable Melville W. Fuller, at Concord, this fifth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

[L. S.] FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States for the District of New Hampshire.

7 And on said fifth day of February the defendant files in this court a petition for writ of error and assignment of errors, and said petition for writ of error is allowed, and the writ of error issues, made returnable at the Supreme Court of the United States, at Washington, in the District of Columbia, thirty days from said fifth day of February, and also a citation to the United States to be and appear at the Supreme Court of the United States pursuant to said writ of error.

Whereupon, on said fifth day of *fifth day of* February, the following order for supersedeas is entered:

Order for Supersedeas.

(Feb. 5, 1895.)

Whereas lately sentence has been pronounced against said Warren F. Putnam under said indictment and a writ of error procured and served on the attorney of the United States for this district to reverse the judgment in this cause; and whereas a citation to the United States to be and appear at the Supreme Court of the United States pursuant to said writ of error has been issued—

It is ordered that the said writ of error operate as a stay of proceedings under said sentence, and that the execution thereof be superseded pending said writ of error.

By the court:

FREMONT E. SHURTLEFF, *Clerk.*

8 And thereafter, on said fifth day of February, the United States marshal makes return of the warrant to commit under the second count; which return is endorsed upon the back of said warrant as follows:

Marshal's Return on Warrant under Second Count.

UNITED STATES OF AMERICA, *District of New Hampshire,* } ss:

FEBRUARY 5, 1895.

I return the within warrant wholly unexecuted by reason of the order a copy of which is hereto annexed.

CLARK CAMPBELL,
U. S. Marshal, District of N. H.

And annexed to the said warrant to commit and referred to in said return is the following:

9 *Order for Supersedeas.*

February 5, 1895.

Whereas lately sentence has been pronounced against the said Warren F. Putnam under said indictment and a writ of error procured and served on the attorney of the United States for this district to reverse the judgment in this cause; and whereas a citation to the United States to be and appear at the Supreme Court of the United States, pursuant to said writ of error, has been issued—

It is ordered that the said writ of error operate as a stay of proceedings under said sentence, and that the execution thereof be superseded pending said writ of error.

By the court:

FREMONT E. SHURTLEFF, *Clerk.*

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

And also on said fifth day of February the marshal makes return of the warrant to commit under the seventh count; which return is endorsed upon the back of said warrant as follows:

Marshal's Return of Warrant under Seventh Count.

UNITED STATES OF AMERICA, *District of New Hampshire,* } *ss:*

FEBRUARY 5, 1895.

I return the within warrant wholly unexecuted by reason of the order, a copy of which is hereto annexed.

CLARK CAMPBELL,
U. S. Marshal, District of N. H.

10 And annexed to said warrant to commit and referred to in said return is the following:

Order for Supersedeas.

February 5, 1895.

Whereas lately sentence has been pronounced against the said Warren F. Putnam under said indictment, and a writ of error procured and served on the attorney of the United States for this district to reverse the judgment in this cause; and whereas a citation to the United States to be and appear at the Supreme Court of the United States, pursuant to said writ of error, has been issued—

It is ordered that the said writ of error operate as a stay of proceedings under said sentence, and that the execution thereof be superseded pending said writ of error.

By the court:

FREMONT E. SHURTLEFF, *Clerk.*

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

And on said fifth day of February the following order for bail bond is entered:

Order for Bail Pending Writ of Error.

(Feb. 5, 1895.)

Whereas lately, at the said circuit court, sentence was pronounced against the said defendant, and the said defendant having obtained
11 a writ of error to remove the said cause to the Supreme Court of the United States to reverse the judgment therein, and a citation having been issued to the United States to be and appear at the said Supreme Court pursuant to said writ of error, which citation has been served upon the attorney of the United States for said district—

It is ordered that the said defendant be admitted to bail pending said writ of error, and that he recognize, with sufficient surety, in the sum of ten thousand dollars.

By the court:

FREMONT E. SHURTLEFF, *Clerk.*

Whereupon, on said fifth day of February, the following bail bond is taken in open court, as follows:

Bail Bond.

(Acknowledged Feb. 5, 1895.)

UNITED STATES OF AMERICA, *New Hampshire District,* } *ss:*

At a circuit court of the United States begun and holden at Concord, within and for the district of New Hampshire, on the eighth day of October, in the year of our Lord one thousand eight hundred and ninety-four, to wit, February 5, 1895, in the case of The United States, by indictment, No. 479, *versus* Warren F. Putnam, defendant, personally appeared Warren F. Putnam, late of Exeter, in said district; Wm. A. Patten, of Kingston, in said district, and Everett S. Horton, of Attleboro, in the district of Massachusetts, and acknowledged themselves to be severally indebted unto the United States of America in the sums following, viz:

The said Warren F. Putnam, as principal, in the sum of
12 ten thousand dollars, and Wm. A. Patten, as surety, in the sum of ten thousand dollars; the said Everett S. Horton, as surety, in the sum of ten thousand dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said United States, if default be made in the performance of the condition following:

Whereas the said defendant has this day been ordered to be admitted to bail pending the writ of error issued in this cause, returnable to the Supreme Court of the United States thirty days from the date hereof:

Now, the condition of this recognizance is such that if the said Warren F. Putnam shall personally appear before the circuit court of the United States within and for the district aforesaid whenever required after the mandate of the said Supreme Court shall be received in this cause or whenever at other times ordered by this court to answer to such matters and things in the premises as shall be objected against him on behalf of the said United States, and more especially to such judgment as shall be awarded against him therein, and shall do and receive that which by this court shall be enjoined upon him in relation to the premises and not depart without license, and shall meanwhile from term to term and day to day appear in this court whenever lawfully required in relation to the premises, then the above obligation to be void and of no effect; otherwise to abide in full force, power, and virtue.

Attest: FREMONT E. SHURTLEFF, *Clerk.*

13 It is ordered on, to wit, the said fifth day of February, that Warren F. Putnam, the respondent, be discharged from custody in pursuance to the terms of said bond.

On the eighth day of February, A. D. 1895, the defendant files the following bill of exceptions; which bill of exceptions is allowed in open court and is as follows:

14 *Bill of Exceptions upon Sentence.*

(Filed Feb'y 8, 1895.)

An indictment under section 5209 of the Revised Statutes of the United States was returned by the grand jury at the December term, 1893, of the district court of the United States of America for the district of New Hampshire, sitting at Concord, in said district, against Warren F. Putnam, charging him as president of the National Granite State bank, an alleged national banking association organized under the laws of the United States and carrying on a national banking business at Exeter, in said district of New Hampshire, with embezzlement, abstraction, and conversion to his own use, with intent to injure and defraud the bank, of moneys, funds, and credits of said bank. The indictment, when presented by the grand jury, contained 10 counts.

On or about Feb. 14, 1894, the defendant, being arraigned, pleaded not guilty, reserving all rights to object to the form or sufficiency of the indictment by demurrer or otherwise. On or about March 9, 1894, general demurrers were filed by the defendant to each and every count of the indictment. On or about Oct. 8, 1894, after argument upon said demurrers, counts 3, 5, and 8 were quashed and counts 1, 2, 4, 6, 7, 9, 10 were sustained, and the respondent ordered to answer further to said counts.

On Sept. 28, 1894, upon order of the court, the defendant was again arraigned, and thereupon pleaded not guilty.

On Oct. 4, 1894, upon motion of the district attorney and

order of the court thereon, the cause was remitted to the Oc-
15 tober term of the circuit court for the district of New Hampshire. Trial by jury was had at said October term, in Concord, on December 20, 1894, and various days thereafter.

At the close of the evidence for the prosecution, upon motion of counsel for the defendant, counts 4, 6, and 9 were withdrawn from the consideration of the jury, and, count 10 having been voluntarily withdrawn by the district attorney, with consent of the defendant, the case was submitted to the jury on counts 1, 2, and 7.

The jury returned a verdict of guilty on counts 2 and 7 and not guilty on count 1.

On January 31, 1895, and after the general bill of exceptions to errors occurring in the cause up to that time had been finally settled and filed, the district attorney moved for sentence upon counts 2 and 3. Counsel for the defendant urged orally that the court could not legally sentence the defendant to imprisonment in the New Hampshire State prison, but that the court should sentence the defendant, if at all, to imprisonment in some suitable jail within the State. After hearing counsel the court imposed the following sentence, as appears of record:

"*Sentence.*

"Upon the verdict under the second count of the indictment it is ordered that respondent be imprisoned in the State's prison at Concord for the period of five years, and while imprisoned in the State's prison at Concord he shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State's prison is situ-
16 ated, and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State and stand committed till sentence be performed.

"Upon the verdict under the seventh count it is ordered that respondent be imprisoned at the State's prison in Concord for the term of five years, and while so imprisoned in the State's prison at Concord he shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State's prison is situated, and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State, and stand committed till sentence be performed.

"Ordered that the imprisonment under the seventh count be concurrent with the imprisonment under the second count."

To this sentence the defendant duly excepted on the ground that under the laws of the United States and of the State of New Hampshire persons convicted of offences against the laws of the United States could not properly be sentenced to confinement in said New Hampshire State prison unless "hard labor" were annexed as part of the sentence, and that "hard labor" was not and could not

rightfully be annexed to the sentence in this case, which is imposed under section 5209 of the Revised Statutes of the United States.

On Feb. 5, 1895, the following motion was filed by the defendant's counsel:

17 "Circuit Court of the United States, District of New Hampshire, *ss:* October Term, 1894.

UNITED STATES
v.
WARREN F. PUTNAM.

Motion that Sentence to Confinement in Jail be Imposed.

Now comes the defendant, Warren F. Putnam, by his counsel appearing in that behalf, and moves the court that if any sentence shall be imposed in this cause such sentence shall be that the defendant be confined in some suitable State jail and not in the State prison at Concord.

WARREN F. PUTNAM,
By his attorneys, STREETER & WALKER.

(*Filing.*)

Feb'y 5, 1895.—The sentence in this case was pronounced Jan'y 31, 1895. The ground stated in the foregoing motion was urged orally before sentence. This formal motion is filed Feb'y 5, 1895, as of Jan'y 3, 1895, and before sentence, so far as I have authority to allow it.

EDGAR ALDRICH,
Presiding Judge."

Said motion having been denied at the time and under the circumstances stated, the defendant excepted on the ground that under the laws of the United States and of the State of New Hampshire persons convicted of offences against the laws of the United States could not properly be sentenced to confinement in said New Hampshire State prison unless "hard labor" were annexed as part of the sentence, and that "hard labor" was not and could not rightly be annexed to the sentence in this case, which is imposed under section 5209 of the Revised Statutes of the United States.

On Feb. 8, 1895, the following motion was filed in open court by leave of court granted at that time:

18 "Circuit Court of the United States, District of New Hampshire, October Term, 1894.

UNITED STATES
v.
WARREN F. PUTNAM.

Motion that the Court Modify Sentence Already Passed in this Cause.

Now comes the defendant, Warren F. Putnam, by his counsel, appearing in that behalf, and moves the court to modify the sentence

imposed in this case on Jan. 31, 1895, by changing the place of imprisonment from the New Hampshire State prison, as ordered in said sentence, to some suitable State jail in New Hampshire.

WARREN F. PUTNAM,
By his attorneys, STREETER & WALKER.

Filed Feb. 8, '95.

Feb'y 8, 1895.

Motion denied.
ALDRICH, *J.*

Counsel for the defendant urged the allowance of said motion by argument. Said motion was denied by the court, and the defendant excepted on the ground that under the laws of the United States and of the State of New Hampshire persons convicted of offenses against the laws of the United States could not be sentenced to confinement in said New Hampshire State prison unless "hard labor" were annexed as part of the sentence; that "hard labor" was not and could not rightfully be annexed to the sentence in this case, which is imposed under section 5209 of the Revised Statutes of the United States, and on the further ground that it was proper for the court to modify sentence during the term in which said sentence was passed, provided there was any error in said sentence.

WARREN F. PUTNAM,
By his attorneys, STREETER & WALKER.

Allowed.
EDGAR ALDRICH,
Presiding Judge.

18½ A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

19 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of New Hampshire,* } ss:

I, Fremont E. Shurtleff, clerk of the circuit court of the United States for the first circuit and district of New Hampshire, hereby certify that the foregoing is a true copy of the record in the case of The United States, by indictment, *v.* Warren F. Putnam, determined in said court on and after judgment was entered in said cause, and annexed hereto are true and attested copies of a petition for writ of error and assignment of errors filed in said court, and an original citation on writ of error and acknowledgement of service thereon, all constituting a true and attested copies of the record and proceedings in said cause from the date of judgment, with all things concerning the same.

Seal of Circuit Court, New Hampshire.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Concord, in said district, on this fifth day of March, in the year of our Lord one thousand eight hundred and ninety-five.

FREMONT E. SHURTLEFF, *Clerk.*

20 Circuit Court of the United States, District of New Hampshire, *ss:* October Term, 1894.

UNITED STATES
v.
WARREN F. PUTNAM.

Petition for Additional Writ of Error.

(Filed Feb. 8, 1895.)

To the honorable justices of the Supreme Court of the United States or any judges of the circuit court of the United States for the said district:

And now comes the defendant, Warren F. Putnam, and complains that in the records and proceedings and also in the rendition of judgment in a plea between the United States and the defendant, tried in the circuit court of the United States for said district at the October term, A. D. 1894, in which a judgment was rendered against him on the 31st day of January, A. D. 1895, manifest error hath intervened, to the great damage of the said defendant.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

W. F. PUTNAM.
F. S. STREETER, *Of Counsel.*

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

21 Circuit Court of the United States, District of New Hampshire, *ss:* October Term, 1894.

UNITED STATES
v.
WARREN F. PUTNAM.

Assignment of Errors upon Sentence.

(Filed Feb'y 8, 1895.)

Afterwards, to wit, on the second Monday of October, in the year of our Lord eighteen hundred and ninety-five, at the October term for eighteen hundred and ninety-five of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said Warren F. Putnam, by Frank S. Streeter, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, to wit:

1. The circuit court has erred in sentencing the defendant to imprisonment in the New Hampshire State prison, at Concord, as appears by the following:

"On January 31, 1895, and after the general bill of exceptions to errors occurring in the cause up to that time had been finally set-

tled and filed, the district attorney moved for sentence upon counts 2 and 3. Counsel for the defendant urged, orally, that the court could not legally sentence the defendant to imprisonment in the New Hampshire State prison, but that the court should sentence the defendant, if at all, to imprisonment in some suitable jail within the State. After hearing counsel the court imposed the following sentence, as appears of record:

"*Sentence.*

"Upon the verdict under the second count of the indictment it is ordered that respondent be imprisoned in the State's prison at Concord for the period of five years, and while imprisoned in the State's prison at Concord he shall in all respects be subject
22 to the same discipline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State's prison is situated, and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State and stand committed till sentence be performed.

"Upon the verdict under the seventh count it is ordered that respondent be imprisoned at the State's prison in Concord for the term of five years, and while so imprisoned in the State's prison at Concord he shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State's prison is situated, and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State and stand committed till sentence be performed.

"Ordered that the imprisonment under the seventh count be concurrent with the imprisonment under the second count."

"To this sentence the defendant duly excepted on the ground that under the laws of the United States and of the State of New Hampshire persons convicted of offences against the laws of the United States could not properly be sentenced to confinement in said New Hampshire State prison unless 'hard labor' were annexed as part of the sentence, and that 'hard labor' was not and could not rightfully be annexed to the sentence in this case, which is imposed under section 5209 of the Revised Statutes of the United States."

2. The circuit court has erred in denying the defendant's "motion that sentence to confinement in jail be imposed," as appears from the following:

"On Feb. 5, 1895, the following motion was filed by the defendant's counsel:

"Circuit Court of the United States, District of New Hampshire, *ss:*
October Term, 1894.

UNITED STATES
v.
WARREN F. PUTNAM.

Motion that Sentence to Confinement in Jail Be Imposed.

"Now comes the defendant, Warren F. Putnam, by his
23 counsel, appearing in that behalf, and moves the court that if any sentence shall be imposed in this cause such sentence shall be that the defendant be confined in some suitable State jail and not in the State prison at Concord.

WARREN F. PUTNAM,
By his attorneys, STREETER & WALKER.

(*Filing.*)

"Feb'y 5, 1895.—The sentence in this case was pronounced Jan'y 31, 1895. The ground stated in the foregoing motion was urged orally before sentence. This informal motion is filed Feb'y 5, 1895, as of Jan'y 31, 1895, and before sentence, so far as I have authority to so allow it.

EDGAR ALDRICH,
Presiding Judge."

"Said motion having been denied at the time and under the circumstances stated, the defendant excepted on the ground that under the laws of the United States and of the State of New Hampshire persons convicted of offences against the laws of the United States could not properly be sentenced to confinement in said New Hampshire State prison unless 'hard labor' were annexed as part of the sentence, and that 'hard labor' was not and could not rightfully be annexed to the sentence in this case, which is imposed under section 5209 of the Revised Statutes of the United States."

3. The circuit court has erred in denying the defendant's motion filed February 8, 1895, entitled "Motion that the court modify sentence already passed in this cause," as appears by the following:

"On Feb. 8, 1895, the following motion was filed in open court by leave of court granted at that time:

"Circuit Court of the United States, District of New Hampshire, *ss:*
October Term, 1894.

UNITED STATES
v.
WARREN F. PUTNAM.

24 *Motion that the Court Modify Sentence Already Passed in this Cause.*

"Now comes the defendant, Warren F. Putnam, by his counsel appearing in that behalf, and moves the court to modify the sen-

tence imposed in this case on Jan. 31, 1895, by changing the place of imprisonment from the New Hampshire State prison, as ordered in said sentence, to some suitable State jail in New Hampshire.

WARREN F. PUTNAM,
By his attorneys, STREETER & WALKER."

(*Filing.*)

" Filed Feb. 8, '95

Feb'y 8, 1895.
Motion denied.

ALDRICH, *J.*"

" Counsel for the defendant urged the allowance of said motion by argument. Said motion was denied by the court, and the defendant excepted on the ground that under the laws of the United States and of the State of New Hampshire persons convicted of offences against the laws of the United States could not be sentenced to confinement — said New Hampshire State prison unless ' hard labor ' were annexed as part of the sentence; that ' hard labor ' was not and could not rightfully be annexed to the sentence in this case, which is imposed under section 5209 of the Revised Statutes of the United States; and on the further ground that it was proper for the court to modify sentence during the term in which said sentence was passed, provided there was any error in said sentence."

WARREN F. PUTNAM.
FRANK S. STREETER, *Of Counsel.*

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within thirty days of the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Hampshire in a cause entitled United States *versus* Warren F. Putnam, defendant, wherein the said defendant is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal of Circuit Court, New Hampshire.

Witness the Honorable Edgar Aldrich, presiding judge at the trial and now holding the circuit court of the United States for the district of New Hampshire, this twentieth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

EDGAR ALDRICH,
Presiding Judge.

I hereby accept service in behalf of the United States of the within citation.

Manchester, N. H., Feb. 21, 1895.

OLIVER E. BRANCH,
U. S. Att'y, Dist. New Hampshire.

Endorsed on cover: Case No. 15,847. New Hampshire, C. C. U. S. Term No., 574. Warren F. Putnam, plaintiff in error, *vs.* The United States. Filed March 28th, 1895.

Office Supreme Court U. S.
FILED.
APR 6 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WARREN F. PUTNAM, PLAINTIFF IN error,
v.
THE UNITED STATES.
No. 962. 573

WARREN F. PUTNAM, PLAINTIFF IN error,
v.
THE UNITED STATES.
No. 963. 574

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WARREN F. PUTNAM, PLAINTIFF IN error, *v.* THE UNITED STATES.	No. 962.
WARREN F. PUTNAM, PLAINTIFF IN error, *v.* THE UNITED STATES.	No. 963.

MOTION TO ADVANCE.

The plaintiff in error in the above-entitled cases was indicted, under section 5209 of the Revised Statutes, at the January term, 1894, of the circuit court of the United States for the district of New Hampshire, for embezzling, abstracting, and converting to his own use, with intent to injure and defraud the bank, money, funds, and credits of the National Granite State Bank, of Exeter, of which he was president. He was found guilty, and on January 31 last was sentenced to imprisonment for five years at hard labor in the State prison at Concord. He has sued out

two writs of error, one on the case generally and the other for the purpose of determining whether he can be imprisoned in the State prison instead of a county jail.

The defendant is out on bail in the sum of $10,000 since February 5, 1895, awaiting the decision of this court.

The Solicitor-General respectfully moves the court to advance the cases upon the docket and set them down for hearing at such early day during the next term as may be convenient to the court.

Counsel for the plaintiff in error consent to this motion.

HOLMES CONRAD,
Solicitor-General.

O

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HOLMES CONRAD,
Solicitor-General.

TABLE OF CONTENTS.

	PAGE.
Statement of the Case	1
Specification of Errors Relied upon	16
Brief of the Argument	42
A. Variance	42
B. Incompetent and Immaterial Evidence	63
C. Failure to Prove Creation, Organization, and Existence of the Bank Named in the Indictment	65
D. The Charge	71
E. Improper Mode of Refreshing Recollection	76
F. Cross Examination of Byington	84
G. Jurisdiction	87

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 573.

WARREN F. PUTNAM, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case comes up on writ of error from the Circuit Court of the United States for the district of New Hampshire.

An indictment under section 5209 of the Revised Statutes of the United States was returned by the grand jury at the December term, 1893, of the District Court of the United States for said district of New Hampshire, against the plaintiff in error, charging him, as president of the National Granite State Bank, an alleged national banking association, organized under the laws of the United States, and carrying on a national banking business at Exeter, New Hampshire, with embezzlement, abstraction and conversion to his own use, with intent to injure and defraud the bank, of moneys, funds and credits of said bank. (Record, p. 17.)

Section 5209, Revised Statutes, is as follows:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any

false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment, when presented by the grand jury, contained ten counts. (Record, pp. 2 and 17.)

On or about February 14, 1894, the defendant being arraigned, pleaded not guilty, reserving all rights to object to the form or sufficiency of the indictment, by demurrer or otherwise. On or about March 9, 1894, general demurrers were filed by the defendant to each and every count of the indictment. On or about October 8, 1894, after argument upon said demurrers, counts 3, 5, and 8 of the indictment were quashed, and counts 1, 2, 4, 6, 7, 9, and 10 were sustained, and the respondent ordered to answer further to said counts. (Record, pp. 17, 18.)

On September 28, 1894, upon order of the court, the defendant was again arraigned upon the counts sustained upon demurrer, and thereupon pleaded not guilty. (Record, p. 18.)

On October 4, 1894, upon motion of the district attorney and order of court thereon, the cause was remitted to the October term of the Circuit Court for said district, and a trial was had at said term, in Concord, on December 20, 1894, and various days thereafter. (Record, p. 18.)

At the close of the evidence for the prosecution, upon motion, counts 4, 6, and 9 were withdrawn from the consideration of the jury, and, count 10 having been voluntarily withdrawn by the District Attorney with consent of the defendant, the case was submitted to the jury on counts 1, 2, and 7. (Record, p. 18.)

The first count charged the defendant, as president of a certain national banking association then and there known and designated as the National Granite State bank, which said association had been theretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking business at said Exeter under the laws aforesaid, with embezzlement of twenty-four bonds of the property of said association. (Record, p. 2.)

The second count charged the defendant, as president aforesaid, with the abstraction and conversion of the same bonds referred to in the first count. (Record, p. 3.)

The seventh count charged the defendant, as president aforesaid, with the abstraction and conversion of moneys, funds, and credits of the property of said association, to wit, forty thousand dollars, a more particular description of which was alleged to be to the grand jury unknown. (Record, p. 7.)

The jury returned a verdict of guilty on counts 2 and 7, and not guilty on count 1. (Record, p. 18.)

Before the trial the district attorney wrote to the respondent's counsel a letter giving a specification of the items upon which the seventh count was founded (Record, p. 18); and subsequently the court limited the evidence to the transactions connected with said items. (Record, pp. 18 and 19.)

Early in the trial of the cause, the defendant objected to the sufficiency of the indictment and of the proof adduced by the Government, for the reason that the Government offered no evidence to show the existence of a national bank authorized to do business by and under the name of the "National Granite State bank," as set out in the indictment. The position of the Government and of the defendant upon this point may be outlined as follows:

The position of the Government was that under this indictment it was competent to show that authority was granted to certain persons to carry on business as a national banking association at Exeter under the name of "The National Granite State Bank of Exeter," and that the association so authorized actually carried on business at the place named, under the name of, and was generally known as, the "National Granite State bank"; and that the respondent and the Government had full knowledge of all the facts, and that the respondent was president of such association so doing business.

The position of the defendant was that the indictment and proof were insufficient, on the ground that there was a variance between the name of the bank alleged in the indictment, viz., the "National Granite State bank" and that indicated by the proof, viz., the "National Granite State Bank of Exeter," and that the evidence to show that there was an association at Exeter doing business within the scope of the authority granted to an association by the name of the "National Granite State Bank of Exeter," but under a different name, viz., the "National Granite State bank," was immaterial and incompetent, because no legal evidence was offered to show the existence of a bank under the name of the "National Granite State bank." (Record, p. 19.)

The Government offered in evidence a certificate of the comptroller of the currency containing an exemplified copy of the original certificate, dated May 15, 1865, authorizing an association therein named to do business as a national banking association. In said original certificate the name of the association appears in two places in the following words "the National Granite State Bank of Exeter," said words being inclosed in both cases in quotation marks. (For copy of said certificate, see Record, p. 20.)

The Government also offered in evidence a certificate of the comptroller of the currency containing an exemplified copy of the original certificate, dated April 8, 1885, extending the authority of the association therein named to do business as a national banking association until April 12, 1905. In said original certificate the association is described as "the National Granite State Bank of Exeter" in two places, in the same manner as in the original

certificate of authorization. (For copy of said certificate, see Record, p. 21.)

The Government also offered in evidence a certificate of the comptroller of the currency containing an exemplified copy of the certificate of organization of an association therein named as a national banking association, under the name and title of "the National Granite State Bank of Exeter."

It further appeared by said organization certificate that said association, viz., the National Granite State Bank of Exeter, was originally a state bank under the name of the Granite State bank, which was converted into a national banking association by vote of its board of directors under act of congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June 3, 1864. (For copy of said certificate see Record, pp. 21, 22.)

The Government also offered in evidence the original certificate of the comptroller of the currency, dated April 8, 1885, authorizing the association therein named, which was described in two places as "the National Granite State Bank of Exeter," said words being inclosed in quotation marks therein, to continue its business until April 12, 1905. (For copy of said certificate see Record, p. 23.)

The four certificates above described were admitted *de bene*, pending a motion made by the district attorney to amend the indictment, and the defendant duly objected to each certificate as it was offered and excepted to its admission upon the grounds that it was improper to admit evidence *de bene* in a case of this kind, and also on the ground of variance between the allegations of the indictment and the proof contained in the certificates of authorization as to the name of the bank of which the defendant was president; also upon the ground of variance between the allegation and the proof as to ownership of the property stated in the indictment; and also upon the ground that the evidence had no tendency to prove the allegations of the indictment referring to "the National Granite State bank."

After denying the motion to amend, the court instructed the jury, subject to the defendant's exception, that the certificates could only be considered upon the question whether there was a national banking association at Exeter and as tending to show the character of the business which the association was authorized to do. (Record, p. 24.)

The Government also produced in evidence, subject to defendant's exceptions which were duly taken upon the same grounds as above stated, a record which the witness testified was the directors' record of the National Granite State bank, the witness being allowed to read as follows: "The name and title of the association into which said Granite State bank is to be changed and converted shall be the National Granite State Bank of Exeter." (Record, p. 24.)

Against defendant's exception duly taken, the Government produced in evidence certain sections entitled in the above named record "By-laws of the National Granite State bank," said sections relating to the annual meetings and record thereof, the officers of the bank,

the duties and liabilities of the cashier, and the authority and duties of the directors. In every case the name of the bank was given as "the National Granite State bank." (Record, p. 25.)

Against defendant's exceptions duly taken, various papers and documents were produced in evidence by the Government to show that there was a bank at Exeter doing business under the name of "the National Granite State bank." (A description of said papers is given in the record, pp. 25, 26, and 27.) This evidence was admitted by the court only as bearing upon the name of the bank. There was also evidence to show that the same bank in some instances used the name "the National Granite State Bank of Exeter" in connection with its business. (Record, p. 27.)

On behalf of the Government, the cashier of the bank above referred to, testified that the bank of which Putnam was president, and which did business at Exeter, issued bills which it obtained from the treasury department at Washington; that it forwarded its mutilated currency to the comptroller for redemption; made reports to the treasury department; was examined by national bank examiners; and had bonds deposited with the treasury department at Washington, on which it received interest from Washington quarterly.

Against the defendant's exception duly taken, the Government was permitted to show that there was no other national bank located in Exeter except the National Granite State bank, at the time it suspended and at the time that the indictment was found; that Putnam was connected with no other bank there or elsewhere; that the banks at Exeter were the Union Five Cent Savings Bank and the Squamscott Savings Bank; that the banking business carried on at Exeter under the name of the National Granite State bank was that of a national bank, and that such business was done under the authority derived from the Comptroller of the Currency (Record, p. 27.)

All this evidence was admitted for the purpose of showing that there was an association at Exeter of which the respondent was president, carrying on the business of a national bank under the name of the National Granite State bank, and acting within the general scope of authority conferred by the certificates of authorization, hereinbefore described, which were the only certificates of authorization and organization introduced in evidence by the Government. (Record, p. 28.)

Part of the checks introduced into evidence under the seventh count were signed "The National Granite State Bank of Exeter, N. H., by W. F. Putnam, President." (Record, p. 29.)

C. M. Dorr, witness for the prosecution, testified that he was bank examiner and went to Exeter to take charge of the National Granite State bank and made an examination of its affairs. In the course of his direct examination, the prosecuting attorney, for the alleged purpose of refreshing the witness's memory, produced a copy of the testimony of the witness before the grand jury, and, against the defendant's objection and exception, asked questions as

appear from the following verbatim extract from the record, which fully shows the character of the examination.

Mr. BRANCH: I propose to ask this witness a leading question, because I am taken by surprise at his answer. I have his testimony before the grand jury, and I wish to ask him if he did not testify to certain things before the grand jury.

The COURT: You may do that.

Mr. STREETER: To that I object and except.

The COURT: It is a matter of discretion with the court to allow counsel on either side who say they are surprised to ask such question. It is not a matter of exception.

(By Mr. BRANCH:)

Q. (Referring to minutes and apparently reading for the purpose of putting his question.) Do you now recollect that you testified before the grand jury that when you discovered those bonds were gone you went to Boston and learned that Mr. Putnam had them, and that he acknowledged to you he had those bonds on the 3d day of August? Did you not so testify before the grand jury?

A. If it is a matter of record I suppose that it is so. Mr. Putnam done considerable of the business by letters.

Q. I am asking if you did not so testify before the grand jury.

A. If it is a matter of record I do not dispute the record.

Q. Do you not recollect that fact that you asked him what he had done with them?

Mr. STREETER: I still object and except to this because it is the record taken before the grand jury and should not be introduced here; it is improper, and I object to it.

The COURT: I do not think you ought to say it is improper after the court has ruled that it is.

Mr. STREETER: I beg your honor's pardon, I did not understand that you had ruled on this point.

The COURT: It is a thing often done, and when counsel say they are surprised by the way a witness recollects a thing it is within the discretion of the court to allow counsel to direct the attention of the witness to something which may refresh his recollection.

(By The COURT:)

Q. Do you recollect this conversation in view of your attention being now called to it?

A. I do not recall distinctly where I had that interview, but I think it must have been at the station at Exeter.

Q. It is not a question of where it must have been, but whether you recall it now.

(By Mr. BRANCH:)

Q. Let me refresh your recollection a little further. Did you testify before the grand jury that you said to him something about the bond, and he said, "Mr. Dorr, I will state to you I am not going away?"

A. Yes, sir; he did.

Mr. STREETER: I object to the reading here before this tribunal of the records taken before the grand jury—records of the grand-jury room—and I renew the objection which I took when my brother first put it in, two or three minutes ago. I renew the objection I then took in the production of grand-jury records before this court.

Mr. BRANCH: I am not.

The COURT: It is competent.

Mr. STREETER: I except.

Q. And did he not say, "I will get the bonds for you as soon as I can"?

A. Yes; I can assent to that.

The COURT: It must be understood that the putting into the question a conversation is merely done for the purpose of directing the witness's attention to the matter, and that it is not in, unless the witness remembers the conversation and states it here.

Mr. STREETER: If your honor will pardon me, my exception to its being read is in the record and I don't want to be deprived of that.

The COURT: That is all right.

(Record, pp. 32, 33, and 34.)

C. E. Byington, witness for the prosecution, on direct examination, testified that Warren F. Putnam was president and director of the National Granite State bank from January 1, 1893, until its suspension, and acted as clerk; that he was president of the Leavenworth Electric Railway and of the Lexington Hydraulic Company; that when the directors of the bank learned of certain checks, which they claimed Putnam had drawn without authority, they took as part payment to make up the amount which was withdrawn by said checks, twenty-five thousand dollars worth of bonds of said Leavenworth Electric Railway and ten thousand dollars worth of the bonds of the Lexington Hydraulic Company. He also testified on direct examination that the Leavenworth and Lexington Companies were Mr. Putnam's paramount interest. On cross-examination by defendant's counsel, the witness stated that Mr. Putnam held large amounts of the Leavenworth and Lexington stock on his own account, was buying and selling and had on hand more or less of said securities. Counsel for the defendant then asked:

Q. "What percentage of the stock of the National Granite State Bank of Exeter did Mr. Putnam own during the first six months of 1893?"

The prosecution objected to this question, which was ruled out, and the defendant excepted on the ground that the testimony offered tended to prove his relations to the bank and that the ownership of stock had a bearing upon the question of intent, and that the question related to matters which had been opened up affirmatively by the Government upon direct examination, as appears from the above statement of Byington's testimony. (Record, p. 35).

At the close of the Government's case, the defendant's counsel filed a motion that the court direct or request a verdict for the defendant on the seventh count,

1st. Because the evidence of abstraction is not sufficient to warrant a verdict against the defendant.

2nd. Because of the variance between the allegations in the indictment and proof of place where the alleged offence was committed.

3rd. Because the bill of particulars submitted by the Government to respondent's counsel December 11, 1894, gave notice that the Government under this count would rely solely upon the abstraction of moneys by means of the checks set forth in said bill of particulars, all of which were drawn by the respondent in Boston upon the National Bank of Redemption in Boston and paid by the said National Bank of Redemption in the city of Boston, and because the Government has introduced no evidence that the alleged offence of abstraction or any essential element of said offence was committed elsewhere than in the city of Boston, outside the jurisdiction of this court.

4th. Because the several offences of abstraction as alleged in said seventh count and in the bill of particulars were finally completed by the payment of the checks at the National Bank of Redemption, in the city of Boston, not within this district, and because there is no evidence that any essential part of the offence charged was committed within this district. (Records, pp. 36, 37.)

A summary of the evidence adduced by the Government in support of the seventh count, which the defendant claimed was not sufficient to support said count, is given in the Bill of Exceptions (Record, pp. 37–40), and is printed herein in the Specification of Errors. Specification No. 12, *infra*. So much of said evidence as is material to the defendant's claim will be considered fully in this brief, where the questions are discussed (*infra*, "G.")

After a hearing, the court denied the motion, and the defendant excepted upon the grounds that

1. That the evidence showed that the abstraction, if committed at all, was completed in Boston, Massachusetts, outside the jurisdiction of this court.

2. That the evidence of criminal acts committed within this jurisdiction is not sufficient to establish the jurisdiction of this court over this cause.

3. That the evidence shows that the abstraction, if committed at all, was completed, so far as the defendant was concerned, when the checks by means of which the abstraction was alleged to have been accomplished were paid by the National Bank of the Redemption.

4. That the acts alleged to have been committed by the defendant within this district did not constitute an offence of the character charged in the seventh count and the bill of particulars annexed thereto.

5. That there was a substantial variance between the locality alleged in this count and that indicated by the proof.

After the judge's charge was given and before the jury retired, the defendant excepted.

First. To that portion of the judge's charge relating to the admissibility and effect of the certificates of authorization and of organization of the National Granite State Bank of Exeter.

(Record, pp. 52, 54).

That portion of the charge excepted to on this point is as follows:

After stating the reasonable-doubt rule, the judge said:

"In order to present to you the questions involved it is necessary, perhaps, for me to read from the statute or act of Congress upon which this prosecution is based. Congress has provided the way in which this banking business shall be conducted and had provided that "every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association" shall be punished so and so. So you see that a prosecution under this statute involves the Government in the necessity of establishing a banking association, and that the respondent was an officer of such banking association.

"If certain men should associate themselves together without color of authority from the General Government and pretend to do a banking business, however fraudulently they might carry it on, they would not be within the meaning of this statute. This statute is simply intended to regulate the national banking business carried on under its authority by gentlemen associating themselves together for that purpose.

"So it is incumbent upon the government to show that there was a national bank. In other words, to show that there was a national banking association carrying on business at Exeter under the authority or at least claiming to be under the authority of the treasury department, and it must appear that they were doing business within the scope of that authority, and that this respondent was acting or exercising the office of president of a national bank at the place and within the general scope of authority intended to be conferred.

"So you must find that this association of gentlemen were doing business as a national banking association, and that they were doing business within the line of authority conferred by the certificate of authorization.

"The certificate of authorization, which is one of the original papers creating this association—in other words, which authorizes a banking association at Exeter—proceeds to designate the association under the name of 'the National Granite State Bank of Exeter.'

"Now, it is objected that there is what lawyers call a variance between the proof and the language in the indictment; and there is to this extent, that the words 'of Exeter' are omitted in describing the bank in the indictment. So this certificate of authorization can only be considered by you upon the first questions I have submitted, viz.: Was there a national banking association at Exeter? Was it authorized? Was it organized? Was it doing business under the authority conferred and of the kind and character contemplated by the certificate? If there was a bank there and they

claimed to be doing business under the authority of the General Government, then it was a bank within the meaning of this statute, and if the respondent was president of it and claimed to exercise the privileges incident to such an office he is within the meaning of the statute.

"I have said that this certificate can only be considered upon the general question whether this was a national bank at Exeter, doing business within the line of authority conferred by the court; and upon the same question you may consider the nature of their business, what they were doing, and the manner in which they were transacting the business of the alleged association.

"If you should find these gentlemen were associated together as a banking association and were at the locality and place named, acting under the general authority of the treasury department and within the scope of the authority conferred, then it was a banking association within the meaning of this statute to which I have called your attention.

"If the Government has succeeded in establishing these particulars, still they must go further and establish that the respondent was an officer of the banking association, because the statute is directed against bank officers in their official capacity as acting officers of a national bank.

"As I have said, the defendant claims there is a variance between the name used in the certificate of authorization and the name set out in the indictment. The variance is this: The name of the bank as created was 'the National Granite State Bank of Exeter,' while the indictment charges that the respondent was 'then and there the president of a certain national banking association then and there known and designated as the National Granite State bank, which said association had been theretofore created and organized under and by virtue of the laws of the United States of America and which said association was then and there acting and carrying on a national banking business at said Exeter under the laws aforesaid.' Now, you will see that the variance consists in the description of the official capacity of the respondent in omitting the words 'of Exeter' from the name. Otherwise the name—set out in the indictment precisely as it is in the certificate of authorization. The further allegation in the indictment is that they were known and designated by the name therein set forth, and that they were a national banking association. The position of the respondent is that there is a variance, and there is. I instruct you that there is a variance, and for that reason you should consider this certificate of authorization simply upon the original question of whether or not there was a national banking association there.

"The Government answers this objection of variance by saying the banking association adopted and used and was generally known by a slightly different name; that the association was known and designated as the National Granite State bank, carrying on a national banking business at Exeter; and the Government has introduced evidence tending to show that the association did adopt a different

name and did drop the words 'of Exeter' generally in its business and used it in the bank books, upon their check books and letter-heads, and in their correspondence with the executive department of the General Government.

"If this be so, the Government may, notbwithstanding the variance which I have stated, proceed against the respondent either under the name by which the association was originally christened or under the name of its adoption, provided it was so designated and so generally known by the public, including, of course, the respondent and the department of the Government under whose authority they were carrying on the business as a banking association. So, notwithstanding the fact that I say there is a variance, if you should be satisfied that this respondent was connected as president with a bank exercising the authority and privileges of a national bank and adopting and using the name of 'the National Granite State bank,' omitting the words 'of Exeter;' that they were using such name in their business; that the president understood it and designated it as such in the records and papers of the bank, and that the Comptroller of the Currency understood that they were using such a name, then he is an officer of a national banking association and responsible under the laws, providing he is guilty of improper conduct. Then you will come to what we call the merits of the case and say whether he is guilty or not.

"I will repeat: If the Government has established all this and you find that the respondent was president of a banking association acting under the authority of the General Government; that he accepted the position of president and assumed and exercised the duties thereof, knowing that such association had adopted the name of 'the National Granite State bank,' dropping the words 'of Exeter,' and that, being so designated, was generally known as such and was suffered to go on doing business under such name and at the place indicated by the certificate of authorization, then he was president of a banking association within the meaning of section 5209 of the Revised Statutes, which is, as I have stated, directed against any president or other officer of a national banking association who commits a wrong within the meaning of such section.

"If you find all these questions in the affirmative, you will then come to the questions presented by the various counts in the indictment which are to be submitted." (Record, pp. 52–54.)

(2). The defendant excepted to that portion of the charge relating to the question of variance between the name used in the indictment to designate the bank and that proved by the certificates of authorization and organization. That portion of the charge excepted to on this point is the same as that set out under the point immediately preceding. (Record, p. 54).

(3). The defendant excepted to that portion of the judge's charge relating to the admissibility and effect of the evidence adduced by the government to prove that the bank carried on business under the name of the National Granite State bank. That portion of the

charge excepted to on this point is the same as that set out under the first point immediately preceding. (Record, p. 54).

(4). The defendant excepted to that portion of the judge's charge relating to the right of the government to proceed against the defendant, as president of the bank described by either of two names, viz., the "National Granite State Bank," and the "National Granite State Bank of Exeter." That portion of the charge excepted to on this point is the same as that set out under the first point immediately preceding. (Record, pp. 54, 55.)

(5). The defendant excepted to all that portion of the charge relating to the place where the abstraction alleged in the seventh count was committed as bearing on the question of jurisdiction and to the effect of the evidence pertaining thereto. The portion of the charge excepted to on this point is as follows:

"Now, while the general rule laid down with reference to the other counts applies here, the inquiry is complicated by other elements which enter into the transaction. I must, therefore, call your attention to other claims and considerations.

"This court generally has jurisdiction only of offenses committed in New Hampshire. So, if you should find that the abstraction complained of in this count was fully completed in Massachusetts, then it is your duty to return a verdict of not guilty; but if you should find that he is guilty of abstraction conceived and partially accomplished in Massachusetts, but finally consummated in New Hampshire, then the offense is within the jurisdiction of the Federal court in this district of New Hampshire, and your verdict should be guilty.

"Now, that jurisdiction is based upon another section of the statute, which I will read, as it will be more satisfactory than a statement by myself. Section 731 of the Revised Statutes of the United States provides that 'when any offence against the United States is begun in one judicial district and completed in another it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein.'

"So you see, if you inquire into this under the rules I have stated and find that there was wrongful abstraction, that it was conceived in Massachusetts and begun there, but that it was the purpose of making it complete and it was completed in New Hampshire, then it opens up the whole transaction here in this court and can be considered the same as though it all occurred in New Hampshire.

"The theory of the respondent is this: In the first place they say that nothing wrong was done either here or in Massachusetts. Then they say if there was anything wrong in these transactions, which were, as you will remember, the making of these checks aggregating some forty thousand dollars, drawn by Mr. Putnam as president of the bank at Exeter, and the transactions which followed such drawing—if there was anything wrong in that it was begun and completed in Massachusetts.

"The wrongful transaction of which the government complains is that Mr. Putnam, the respondent, made checks on the National Bank of Redemption in Boston, some of them being for five thousand dollars and so on, whereby he withdrew from the funds of the Exeter bank existing there in Boston certain of their assets. Mr. Streeter argues that this was all right, that he had authority to do it, that it was an honest transaction, but, he says, if you find it is wrong it was all done and consummated in Massachusetts, and hence we have nothing to do with it here. If it was consummated in Massachusetts we have nothing to do with it, and so the respondents must be acquitted on that count.

"The government's theory is that the transaction was not completed in Massachusetts; that, although it was commenced there, the checks drawn there, and the money received there, it was not effectually defrauding the bank of its rights until something had been done in New Hampshire, at Exeter, whereby the bank was induced, through deception or artifice, to surrender its credits.

"Now, if the acts of drawing these checks and the conversion of the money were the sole charges in the indictment it would unquestionably be an offense committed in the district of Massachusetts and one with which we should have nothing to do here, but the charge in the indictment is the abstraction of moneys, funds, and credits. I desire to make myself understood, gentlemen. If this indictment merely charged the abstraction of money and said nothing about credits, it being conceded here that the money was withdrawn by means of these checks, it would be an offense committed wholly in Massachusetts and you would have nothing to do with it; but if under the instructions which I am about to give you find that the offence charged, which was the abstraction of moneys, funds, and credits, was not completed and had not been effectually consummated in Massachusetts, but was completed here in New Hampshire, then it would be an offence within the meaning of section 731 about which inquiry may be made here, and the question of guilt or innocence determined upon the whole transaction.

"Mr. Branch, representing the government, says this whole transaction in Boston, so far as the drawing of the checks and the receiving of the money was concerned, was fraudulent. He argues that the bank at a meeting had adopted a resolution providing that the president should not draw checks, and that therefore the president had no authority and the president knew he had no authority to draw checks. This becomes material if you find it was so, because if he had the authority to draw the checks and did withdraw the funds, although he may—done it for the purpose of misappropriating and abstracting the money—if he had the authority to draw those checks it would become a past and completed act in Massachusetts, as you will see; but if he did not have authority, if he was acting outside of his authority and acting fraudulently, while the drawing of the checks was effectual in withdrawing the funds from the Bank of Redemption in Boston, it would not withdraw and abstract the credit of the bank in Exeter existing

in its behalf in the Bank of Redemption in Boston, because, notwithstanding he drew the checks, if he had no authority to do it, the Exeter bank would still be in position to enforce its rights and receive the benefit of its credits which had been improperly and unlawfully interfered with by some unauthorized act in Boston, and while the money had gone and been misapplied the credit of the Exeter bank would be the same substantially and might be enforced. Now, then, if the respondent conceived the plan of drawing these checks, obtaining the money, and abstracting or withdrawing the credit and had the intention at the time he drew the checks and withdrew the money to induce the directors at Exeter, through artifice and misrepresentation, to surrender that credit, then the transaction would be a continuous one and would be within the jurisdiction of this court. So, in order to get jurisdiction here and to enable you to pass upon this question, you must find that the offense was partly committed in Massachusetts—which it is conceded was so if there was any offence—and partly here—that is, in order to give this court jurisdiction, in order to make this offense committed partly in Massachusetts and partly here, you must find that he conceived the plan not only of abstracting these moneys by means of the checks, but of making the transaction complete and effectual by withdrawing the credit existing in behalf of the Exeter bank. So if he came into New Hampshire and through artful deception and fraudulent misrepresentation, with the intention of making the abstraction begun in Massachusetts complete, induced the officers of the bank to surrender that credit, then he is guilty under this charge, which alleges that he wilfully and unlawfully abstracted the moneys, funds, and credits of the Exeter bank.

"But if he had no such purpose, if he acted honestly with respect to the checks and got the money honestly, of course he should not be convicted; or if you find that at the time of the abstraction in Massachusetts he had no intention or scheme to make it effectual by inducing this surrender at Exeter whenever it should come to the attention of the bank officers at Exeter, then you should not find him guilty of the charge in this count. Something has been said about reconciliation sheets. Those are sheets, I suppose, on which the Bank of Redemption puts down the transactions involved in the banking business between that bank and the bank of Exeter, while, on the other hand, the bank at Exeter has sheets on which it keeps its transactions with the Bank of Redemption and they exchange them once in two weeks. If is claimed here that the understanding always was that if there were any errors they were corrected on such trial balances.

"If the respondent, understanding the manner of doing business, entered upon the scheme of abstracting the moneys by means of these checks, and as a part of it understood that when confronted with these balance-sheets in order to make the abstraction of the credit effectual he must induce the bank to surrender such credit, and did do that by making misrepresentations when presented with the sheet in New Hampshire, then it was a transaction begun in

one jurisdiction and completed in another and within the statute to which I have called your attention.

"I have, gentlemen, endeavored to state the questions involved here, and, while I have not restated the general rule as to reasonable doubt which I stated in the outset, it of course applies to all the propositions which it is necessary for the government to make out.

"You are to take the case and give it your best consideration, and pass between the respondent and the government and say whether you are satisfied under the rules stated that he is guilty in respect to any of these counts submitted to you, viz., the 1st, 2d, and 7th counts.

"As to this offence which I have been talking about in the last part of my instructions, when I referred to the one claimed to have been begun in Massachusetts and completed here, if you find him guilty under the rules which I have suggested, the fact that it was afterwards adjusted by his surrendering the bonds would not be an answer, and this for the reason that banks not only do business for profit to themselves, but they have the privilege of issuing currency, receiving deposits, and transacting business with the public generally, and if there was any irregularity, and if the parties undertook to settle between the offender and the stockholders or directors, it is not an answer to a criminal prosecution and should not be so considered by you in this inquiry.

"I have given you the general rule that you may consider all his acts and doings as bearing upon the original intent. This surrender of the bonds may be considered in connection with that, but the fact that he turned over the bonds to make up for these checks, provided you find him guilty with respect to the original transaction, is not a bar to this prosecution, and you are not relieved from passing upon the question of his guilt, although the bonds were surrendered." (Records, pp. 55–58.)

Other exceptions were taken upon alleged errors at the trial, as appears by the bill of exceptions (Record, p. 17 *et seq.*), but they will not be asserted nor urged in argument.

On December 27, 1894, the jury returned a verdict of not guilty on the first count, and guilty on the second and seventh counts. (Record, p. 17).

After verdict and before judgment, the defendant filed a motion praying the court to arrest judgment upon the seventh count and specification filed by the district attorney, as of December 11, 1894, because the count and specification charge the respondent with the commission of fifteen offenses against the laws of the United States, and were therefore bad for duplicity and insufficient to support a judgment. (Record, p. 58.)

After hearing, the court denied this motion. (Record, p. 59.)

On January 31, 1895, the plaintiff in error was sentenced to imprisonment in the state's prison at Concord for the period of five years each upon counts two and seven, imprisonment under the seventh count to be concurrent with the imprisonment under the second. (Record, p. 59.)

SPECIFICATION OF ERRORS RELIED UPON.

The following is a specification of the errors relied upon, which are asserted and intended to be urged in this brief and argument thereon. The errors specified in the assignment of errors, (Record, p. 60, *et seq.*) not included in this specification, are waived.

1. The circuit court has erred in admitting in evidence, by original and by copies, certificates of the Comptroller of the Currency purporting to organize and authorize "the National Granite State Bank of Exeter" to do business as a national banking association, as appears by the following statement:

"The Government offered in evidence a certificate of the Comptroller of the Currency, dated Dec. 6, 1893, attached to which certificate was an exemplified copy of the original certificate, dated May 15, 1865, authorizing the "National Granite State Bank of Exeter" to do business as a national banking association.

"Said certificate and copy are in the following words:

103 V. H. C., E. M. B., A. R. S.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, } *ss:*

Under the provisions of section 884 of the Revised Statutes of the United States I, O. P. Tucker, deputy and acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original copy of the certificate of the Comptroller of the Currency authorizing the National Granite State Bank of Exeter, N. H., to commence the business of banking May 15, 1865, and of the whole of such original on file and of record in my office.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at [L. S.] the Treasury Department, in the city of Washington and District of Columbia, this 6th day of December, A. D. 1893.

O. P. TUCKER,
Deputy and Acting Comptroller of the Currency.

No. 1147.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, *May 15th*, 1865.

Whereas by satisfactory evidence presented to the undersigned it has been made to appear that "the National Granite State Bank of Exeter," in the town of Exeter, in the county of Rocking-
104 ham and State of New Hampshire, has been duly organized under and according to the requirements of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June 3, 1864, and has complied with

all the provisions of said act required to be complied with before commencing the business of banking under said act: Now, therefore, I, Freeman Clark, Comptroller of the Currency, do hereby certify that "the National Granite State Bank of Exeter," in the town of Exeter, in the county of Rockingham and State of New Hampshire, is authorized to commence the business of banking under the act aforesaid.

In testimony whereof witness my hand and seal of office this fifteenth day of May, 1865.

(S'g'd) FREEMAN CLARK,
Comptroller of the Currency.

"The Government also offered in evidence a certificate of the Comptroller of the Currency, dated Dec. 6, 1893, attached to which certificate was an exemplified copy of the original certificate, dated April 8, 1885, extending the authority of the 'National Granite State Bank of Exeter' to do business as a national banking association until April 12, 1905.

Said certificate and copy are in the following words:

105 V. H. C., E. M. B., A. R. S.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, } *ss:*

Under the provisions of section 884 of the Revised Statutes of the United States I, O. P. Tucker, deputy and acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original certificate of the Comptroller of the Currency authorizing the extension of the corporate existence of the National Granite State Bank of Exeter, N. H., until close of business April 12, 1905, and of the whole of such original on file and of record in my office.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at [L. S.] the Treasury Department, in the city of Washington and District of Columbia, this 6th day of December, A. D. 1893.

O. P. TUCKER,
Deputy and Acting Comptroller of the Currency.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, *April 8th,* 1885.

Whereas by satisfactory evidence presented to the undersigned it has been made to appear that "the National Granite State Bank of Exeter," in the town of Exeter, in the county of Rocking-
105½ ham and State of New Hampshire, has complied with all the provisions of the "Act of Congress to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12th, 1882:

Now, therefore, I, Henry W. Cannon, Comptroller of the Currency, do hereby certify that "the National Granite State Bank of Exeter," in the town of Exeter, in the county of Rockingham and State of New Hampshire, is authorized to have succession for the period specified in its amended articles of association, namely, until close of business on April 12, 1905.

In testimony whereof witness my hand and seal of office this 8th day of April, 1885.

[SEAL.] H. W. CANNON,
Comptroller of the Currency.

No. 871. No. 1147.

"The Government also offered in evidence a certificate of the Comptroller of the Currency, dated August 10, 1869, attached to which certificate was an exemplified copy of the certificate of organization of the 'National Granite State Bank of Exeter,' dated August 10, 1869.

"Said certificate and copy are in the following words:

Organization Certificate.

Compared. F. C. C., N. M.

We, the undersigned, the directors of the Granite State Bank of Exeter, in the State of New Hampshire, hereby declare that the owners of two-thirds of the capital stock of said bank have authorized the directors of said bank to make the necessary organization certificate and to change and convert the said bank into a
106 national association under the provisions of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June 3, 1864; and by virtue of said authority and in accordance with the provisions and requirements of the fourty-fourth section of said act we do hereby make and execute this organization certificate:

First. The name and title of this association shall be the National Granite State Bank of Exeter.

Second. The said association shall be located and continued in the town of Exeter, county of Rockingham and State of New Hampshire, where its operations of discount and deposit are to be carried on.

Third. The capital stock of this association shall be one hundred thousand dollars ($100,000), and the same shall be divided into one thousand shares of one hundred dollars each, as authorized by a note of the stockholders of the Granite State bank.

Fourth. The name and residence of each of the stockholders of the said Granite State bank, which is to become a national bank under the provisions of the act of Congress aforesaid, and the number of shares of forty dollars each held by each stockholder are as follows:

(In the exhibit a list of the shareholders of the Granite State bank, showing name, residence, and number of shares, is inserted at this point. Said list, not being material to this case, can be omitted.)

5c. rev. stamp, canceled, C. C., April 12, 1865.

Fifth. This certificate is made in order that the said Granite State bank and the 107 stockholders thereof may avail themselves of the advantages of the aforesaid act, and that the said Granite State bank may be changed and converted into a national banking association under the name and title of the National Granite State Bank of Exeter.

In evidence whereof we have hereunto set our hands this twelfth day of April, eighteen hundred and sixty-five.

ABNER MERRILL.
EDMUND ELLIOT.
WILLIAM W. STICKNEY.
JEREMIAH L. MERRILL.
CHAS. CONNER.
GEORGE G. SMITH.

[5c. rev. stamp, cancelled, "C. C., April 12th, 1863."]

STATE OF NEW HAMPSHIRE, *County of Rockingham,* } *ss:*

On this twelfth day of April, A. D. 1865, personally came before me, a notary public in and of said county, Abner Merrill, Chas. Conner, W. W. Stickney, Edmund Elliot, Jeremiah L. Merrill, and George Smith, directors of the Granite State bank, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

[SEAL OF NOTARY.] WILLIAM B. MORRILL,
Notary Public.

[5c. rev. stamp, cancelled, 4, 12, 1865, W. B. M.]

108 TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, } *ss:*

I certify the foregoing to be a true and complete copy of the original organization certificate of "the Nat'l Granite State B'k of Exeter," with the acknowledgments thereof now on file and of record in this office and of the whole of such originals, and that such originals were so filed and recorded on the sixth day of May, A. D. 1865.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at [SEAL.] the city of Washington, in the District of Columbia, this 10th day of August, A. D. 1869.

R. H. HUBBARD,
Comptroller of the Currency.

"The Government also offered in evidence the original certificate of the Comptroller of the Currency, dated April 8, 1885, authorizing the 'National Granite State Bank of Exeter' to do business as a national banking association until April 12, 1905.

"Said certificate and copy are in the following words:

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *April 8th*, 1885.

Whereas by satisfactory evidence presented to the undersigned it has been made to appear that "the National Granite State
109 Bank of Exeter," in the town of Exeter, in the county of Rockingham and State of New Hampshire, has complied with all the provisions of the "Act of Congress to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12th, 1882:

Now, therefore, I, Henry W. Cannon, Comptroller of the Currency, do hereby certify that "the National Granite State Bank of Exeter," in the town of Exeter, in the county of Rockingham and State of New Hampshire, is authorized to have succession for the period specified in its amended articles of association, namely, until close of business on April 12, 1905.

[L. S.] In testimony whereof witness my hand and seal of office this 8th day of April, 1885.

H. W. CANNON,
Comptroller of the Currency.

No. 1147.

"Against the defendant's objection the four certificates above described were admitted *de bene* pending a motion by the district attorney to amend the indictment, and the defendant excepted to each certificate as it was offered and admitted upon the grounds—

"That it was improper to admit evidence *de bene* in a case of this kind.

"And also on the ground of variance between the allegations of the indictment and the proof contained in the certificates of
110 authorization as to the name of the bank, of which the defendant was president.

"Also upon the ground of variance between the allegations and the proof as to the ownership of the property stated in the indictment.

"Also that the evidence had no tendency to prove the allegations of the indictment referring to the 'National Granite State bank.'

"After denying the motion to amend the court instructed the jury that the certificates could only be considered upon the question as to whether there was a national banking association at Exeter and as tending to show the character of the business which the association was authorized to do.

"The defendant excepted to this ruling on the same grounds as before." (Record, pp. 61, 65.)

2. The circuit court has erred in admitting the following evidence:

"CHARLES E. BYINGTON, witness for the prosecution, testified that he was connected with the National Granite State bank, first as clerk and as cashier, from 1878 to the date of the suspension of the bank, on or about July 27, 1893.

"On direct examination by Mr. Branch the following testimony was given:

(Verbatim.)

Q. I wish you would look at the books now shown you and state if you know what they are.

A. (Pointing to books.) This is a record of stockholders,
111 this also is a record of stockholders, and this is a directors' record.

Q. Of what?

A. Of the National Granite State bank.

Q. What is the other book which is now shown you (handing witness book)?

A. It is a directors' record of the National Granite State bank.

Q. I wish you would turn to the record containing the original organization of the bank.

A. That is it.

Mr. BRANCH: I offer this.

Admitted *de bene*.

Mr. Streeter objects and excepts on the ground—

That it is improper to admit evidence *de bene* in a case of this kind;

And also on the ground of variance between the allegations of the indictment and the proof as to the name of the bank of which the defendant was president;

'Also upon the ground of variance between the allegation and the proof as to the ownership of the property stated in the indictment;

Also that the evidence had no tendency to prove the allegations of the indictment referring to the 'National Granite State Bank.'

"The witness then read: 'The name and title of the association into which said Granite State bank is to be changed and converted shall be the National Granite State Bank of Exeter.

(Record, p. 66.)

112 3. The circuit court has erred in permitting the prosecuting attorney to read from stockholders' and directors' records as appears in the following:

"Against the defendant's objection Mr. Branch reads from the stockholders' record certain sections entitled in said record 'By-laws of the National Granite State bank.' The sections read were sections 1, 3, 6, and 7. Said sections related to the annual meetings and record thereof, the officers of the bank, the duties and liabilities of the cashier, and the authority and duties of the directors.

"Section 6 as follows:

'SECTION 6. The cashier of this bank shall be responsible for all the monies, funds, and valuables of the bank, and shall give bond, with security, to be approved by the board, in the penal sum of twenty thousand dollars, conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all such monies, funds, and valuables and deliver the same on proper demand to the order of the board of directors of this bank or to the person or persons authorized to receive them.'

"Mr. Branch read from the directors' records as follows:

'At a meeting of the directors of the National Granite State bank held on the 13th day of June, 1867, * * * the foregoing by-laws were presented and read by the cashier, and, on motion of Mr. J. L. Merrill, unanimously adopted, etc'

"Also from page 16:

'The National Granite State bank. At a meeting of the directors of the National Granite State bank, held this day, etc.'

The COURT: What is the object of this?

Mr. BRANCH: It is to show that the bank did business under the name set out in the indictment.

113 "Defendant excepted to each quotation from the records as above given on the ground that such evidence was immaterial and incompetent, inasmuch as no evidence had been offered to show the existence of a bank named 'the National Granite State bank,' as described in the indictment." (Record, pp. 66, 67.)

4. The circuit court has erred in admitting in evidence papers introduced by the Government to show that there was a bank at Exeter doing business under the name of "the National Granite State bank," as appears from the following:

"Against defendant's objection the following papers and documents were introduced in evidence by the Government to show that there was a bank at Exeter doing business under the name of the 'National Granite State bank.' The following were identified by the witness, Charles E. Byington, as used by the banking association at Exeter with which he was connected as clerk and cashier. Said papers and documents were put into the case as exhibits and marked by the clerk as such. Said exhibits are as follows:

"Exhibit 3. Deposit ticket, printed.
4. Small envelope, printed.
5. Postal card, printed.
6. Stamped envelope, printed.
7. Postal card, printed.
9. Envelope, printed, used in correspondence with office of comptroller.
10. Envelope, printed, used to send funds to reserve
114 agent.
11. Letter-head, printed.
12. Letter-head, printed.

13. Letter-head, printed, on which was written promissory note signed by defendant in his personal capacity.
14. Letter-head, printed, on which was written a receipt in defendant's handwriting.
15. Deposit slip, printed.
16. Two proxies, printed, for stockholders' meetings, with blanks filled out in defendant's handwriting.

"The following papers and documents were produced and identified by Arthur O. Fuller, witness for the prosecution, as received by him with the other papers and documents of the bank of which he was appointed receiver on Oct. 9, 1893:

"Exhibit 41. Two executions, dated Jan. 31, 1871, and 1872. The headings showing title of case were admitted.
Stockholder's records containing printed notices of annual meetings of 1876, 1877, and 1879 to 1893, inclusive.

"Exhibit 41½. Pass book 'National Granite State —, Exeter, New Hampshire, in account with Arthur O. Fuller, chairman,' in use Dec. 13, 1890, to Feb. 2, 1891.

" 42 and 43. Time notes to order of 'National Granite State bank,' dated respectively May 24 and May 25, 1892, signed by Lexington Hydraulic and Manufacturing Company.

115

"Exhibit 44. Receipt, dated Jan. 20, 1890, given by Arthur O. Fuller to 'National Granite State bank.'

" 46. Personal mortgage, dated Oct. 21, 1890, Hilliard to 'National Granite State bank.'

"Exhibit 47. Declaration of trust, dated Jan. 30, 1890, signed by Folsom in favor of 'National Granite State bank.'

" 48. Blank check, printed, on back of which written receipt, dated Aug. 4, 1891, A. O. Fuller to 'National Granite State bank.'

" 49. Check, dated May 16, 1893, drawn by W. F. Putnam on 'National Granite State bank.'

" 50. Check, dated July 6, 1892, drawn by C. H. Gilman on 'National Granite State bank.'

" 52. Letter, H. N. Smith to Byington, cashier of the 'National Granite State bank.'

" 53. Letter, dated June 21, 1893, American Loan & Trust Co. to 'National Granite State bank.'

" 54. Promissory note protested for benefit of 'National Granite State bank,' by C. E. Byington, notary public.

"Arthur O. Fuller, witness for the prosecution, also read from records of stockholders of the bank of which he was appointed receiver the following notice:

"The annual meeting of the stockholders of the National Granite

State bank will be held at the banking-rooms on Tuesday, Jan. 11, 1876, at 2 o'clock p. m., for the choice of directors and the transaction of any other business that may legally come before said meeting.

W. F. PUTNAM, *Cashier.*

Exeter, Dec. 9, 1875.

116 "The notices of the annual meetings for 1877 and from 1879 to 1893, inclusive, were also read. These notices were substantially the same, and the bank was described therein by the name National Granite State bank.

"The Government introduced the foregoing evidence as tending to show the name under which the association of which the respondent was president was doing business, and for the purpose of showing the nature and locality of the business; and the court said:

'I will say to you, gentlemen, that the only effect of this evidence is its bearing upon the name of the bank; so you need not trouble yourselves to remember anything else.'

"In each of the above-described papers and documents the bank therein referred to was designated by the words 'National Granite State bank.' There was also evidence in the case tending to show that the bank in some instances used the name 'The National Granite State Bank of Exeter' in connection with its business. The defendant objected and excepted to each paper and document as it was put in evidence on the ground that it was incompetent and immaterial, inasmuch as no evidence had been offered to show the existence of a bank named the 'National Granite State bank,' as described in the indictment.

"The witness Byington testified that the bank of which Putnam was president and which did business at Exeter issued bills which it obtained from the Treasury Department, at Washington; that it forwarded its mutilated currency to the comptroller for redemption; made reports to the Treasury Department; was examined by
117 national bank examiners, and had bonds deposited with the Treasury Department, at Washington, on which it received the interest from Washington quarterly.

"Against the defendant's exception the Government was permitted to show that there was no other national bank located in Exeter except the National Granite State at the time it suspended and at the time that the indictment was found; that Putnam was connected with no other bank there or elsewhere; that the banks in Exeter were the Union Five Cent savings bank and the Squamscott savings bank; that the banking business carried on at Exeter under the name of the National Granite State bank was that of a national bank, and that such business was done under the authority derived from the Comptroller of the Currency.

"The foregoing evidence relating to the name of the bank was admitted for the purpose of showing that there was an association at Exeter, of which the respondent was president, carrying on the business of a national bank under the name of the National Granite

State bank and acting within the general scope of authority conferred by the certificates of authorization.

"The certificates of authorization and organization referred to in this bill of exceptions were the only certificates of authorization and organization introduced in evidence by the Government and the only certificates issued to the association of which the respondent was president." (Record, pp. 67–70.)

118 5. The circuit court has erred in admitting evidence as follows:

"Against the defendant's objection C. E. Byington, witness for the prosecution, on direct examination was allowed to state what other banks besides the bank of which he was cashier were doing business at Exeter at the time of the suspension, and also at the time the indictment was returned by the grand jury and to give the names thereof. The defendant excepted on the ground that the evidence was incompetent and immaterial." (Record, p. 70.)

8. The circuit court has erred in admitting the following evidence:

C. M. DORR, witness for the prosecution, testified that he was bank examiner; that he went to Exeter upon order of the
122 comptroller to take charge of the National Granite State bank on Friday, July 28, 1893.

(Verbatim.)

Q. Whom did you find there as officers of the bank when you got there?

A. I found Mr. Byington in the front office, and I think Mr. Putnam was in the directors' room when I arrived.

(By Mr. BRANCH:) How long did Mr. Putnam stay there?

A. I think he was about the bank that day—that is, during the afternoon. I got there in the forenoon.

Q. What did you do first?

Mr. STREETER: I would like to inquire to which count this inquiry is directed.

Mr. BRANCH: First and second.

Mr. STREETER: I object to the general form of the inquiry.

The COURT: I think as a preliminary question it is all right.

The defendant excepted to this ruling.

A. Mr. Byington opened the vault, and I immediately looked through the loans to see whether there were any bonds or stocks owned by the bank, or as collateral to the bank, missing.

Q. What did you discover, if anything?

A. Nothing at that time. There was one bond missing, but I do not think I discovered it at that time. I went through them rather rapidly, of course; that was a bond held by the bank as collateral.

"The defendant excepted on the ground that the answer
123 introduced irrelevant and immaterial matter prejudicial to the defendant.

* * * * * * *

Q. Did you have any conversation with Mr. Putnam, in Boston, about those bonds?

A. I did not see Mr. Putnam in Boston.

Q. Or afterwards?

A. I cannot remember whether I had a little conversation with Mr. Putnam at the station in Exeter in regard to the bonds before he returned the first instalments or not.

Q. Did he ever, at any time or place, tell you what he had done with the bonds?

A. No, sir; he did not deny that he had them in his possession.

"Mr. STREETER: To this answer I except; it is not responsive. If a question had been put calling for this answer I should have objected to it." (Record, pp. 72, 73.)

9. The circuit court has erred in admitting the following evidence and in allowing the reading of the testimony taken before the grand jury, as appears by the following:

"During the direct examination of C. M. DORR, witness for the prosecution, the following occurred:

"(Verbatim.)

A. After I found that the bank had come into possession of these bonds and they were not to be found in the bank—Mr.
124 Putnam had gone to Boston, and I took the next train to Boston.

Q. Did you find him there?

A. I did n't succeed in finding him. I found Mr. Folsom, one of the directors, and consulted with him.

Q. Where did you find Mr. Putnam, if you found him at all?

A. I did n't find him that day. I did n't see him at all.

Q. When did you find him?

A. I do n't think I found him at all. My mind has been occupied by other matters recently, and this matter is not very clear in my mind, but, as I remember it, he returned a portion of those bonds to me through his father.

Q. Did you have any conversation with Mr. Putnam in Boston about those bonds?

A. I did n't see Mr. Putnam in Boston.

Q. Or afterwards?

A. I cannot remember whether I had a little conversation with Mr. Putnam at the station in Exeter, in regard to the bonds, before he returned the first instalment or not.

Q. Did he ever, at any time or place, tell you what he had done with the bonds?

A. No, sir; he did n't deny but he had them in his possession.

Mr. STREETER: To this answer I except. It is not responsive. If a question had been put calling for this answer, I should have objected to it.

Q. Did he ever at any time tell you what he had done with these bonds?

125 A. Not that I now recollect.

Mr. BRANCH: I propose to ask this witness a leading question, because I am taken by surprise at his answer. I have his testimony before the grand jury, and I wish to ask him if he did not testify to certain things before the grand jury.

The COURT: You may do that.

Mr. STREETER: To that I object and except.

The COURT: It is a matter of discretion with the court to allow counsel on either side who say that they are surprised to ask such question. It is not a matter of exception.

(By Mr. BRANCH:)

Q. (Referring to minutes and apparently reading for the purpose of putting the question.) Do you now recollect that you testified before the grand jury that when you discovered those bonds were gone you went to Boston and learned that Mr. Putnam had them, and that he acknowledged to you he had those bonds on the 3d day of August? Did you not so testify before the grand jury?

A. If it is a matter of record I suppose that it is so. Mr. Putnam done considerable of the business by letters.

Q. I am asking if you did not so testify before the grand jury.

A. If it is a matter of record I do not dispute the record.

Q. Do you not recollect that fact that you asked him what he had done with them?

126 Mr. STREETER: I still object and except to this because it is the record taken before the grand jury and should not be introduced here; it is improper, and I object to it.

The COURT: I do not think you ought to say it is improper after the court has ruled that it is.

Mr. STREETER: I beg your honor's pardon; I did not understand that you had ruled on this point.

The COURT: It is a thing often done, and when counsel say they are surprised by the way a witness recollects a thing it is within the discretion of the court to allow counsel to direct the attention of the witness to something which may refresh his recollection.

By the COURT:

Q. Do you recollect this conversation in view of your attention being now called to it?

A. I do not recall distinctly where I had that interview, but I think it must have been at the station at Exeter.

Q. It is not a question of where it must have been, but whether you recall it now.

(By Mr. BRANCH:)

Q. Let me refresh your recollection a little further. Did you testify before the grand jury that you said to him something about

the bond, and he said, "Mr. Dorr, I will state to you I am not going away"?

A. Yes, sir; I did.

Mr. STREETER: I object to the reading here before this tribunal of the records taken before the grand jury—records of the grand jury room—and I renew the objection I took when my brother first put it in, two or three minutes ago. I renew the objection I
127 then took to the production of grand-jury records before this court.

Mr. BRANCH: I am not.

The COURT: It is competent.

Mr. STREETER: I except.

Q. And did he not say, "I will get the bonds for you as soon as I can"?

A. Yes; I can assent to that.

The COURT: It must be understood that the putting into the question a conversation is merely done for the purpose of directing the witness's attention to the matter, and that it is not in, unless the witness remembers the conversation and states it here.

Mr. STREETER: If your honor will pardon me, my exception to its being read is in the record and I do not want to be deprived of that.

The COURT: That is all right." (Record, pp. 73–76.)

128 10. The circuit court has erred in refusing to admit the evidence as appears in the following statement and offer of proof:

"C. E. BYINGTON, witness for the prosecution, testified as follows:

"(Verbatim.)

By Mr. BRANCH:

Q. Who was president of this bank from January 1, 1893, till its suspension—the National Granite State bank?

A. Mr. Warren F. Putnam.

Q. Who were the directors?

A. I suppose they were Mr. Putnam, Mr. Eben Folsom, Mr. Horton, Mr. Patten, and Mr. Burlingame.

Q. Who acted as clerk?

A. Mr. Putnam, the president.

* * * * * * *

Q. What relation did Mr. Putnam bear to the Leavenworth electric railway?

A. He was president.

Q. What was his connection with the Lexington Hydraulic Company?

A. President of that also.

Q. Did he say anything about what he had used this money for that he had drawn out?

A. I do not think I heard him.

* * * * * * *

Q. I understood you to say that on the 24th of May, when this twenty-six-thousand-dollar matter came up, they took as part payment for that twenty-five thousand dollars' worth of Lexington bonds.

129 A. Of Leavenworth bonds.

Q. At the same time they took ten thousand dollars of the bonds of the Lexington Company?

A. Yes, sir.

Q. Was this bank that you were connected with and Mr. Putnam was connected with, which issued bills as you have described and made these returns, located in Exeter?

A. Yes, sir.

The witness also testified, in answer to questions of Mr. Branch, that the Lexington and Leavenworth companies were Mr. Putnam's paramount interest.

On cross-examination by Mr. Streeter, the witness testified as follows:

By Mr. STREETER:

Q. How long before July, 1893, had Mr. Putnam been president of the Leavenworth Company, if you know?

A. I do not know.

Q. Had he for some time prior thereto?

A. I do not think it had been in existence a great while.

Q. You may state whether you did not know that Mr. Putnam held large amounts of the Leavenworth and Lexington bonds and stock on his own account.

A. I understood so in a general way; yes.

Q. And that he was buying and selling more or less?

A. Yes, sir.

Q. That he had on hand more or less of these securities?

A. Yes, sir.

Q. What percentage of the stock of the National Granite State Bank of Exeter did Mr. Putnam own during the first six months of 1893?

130 Mr. BRANCH: I object.

The COURT: I should have doubt about this.

Mr. STREETER: The purpose is plain. This man was standing at the head of this bank. If he was a mere nominal owner of this stock, then his transactions might be viewed in one way. If he was three-fourths owner, which we offer to show, then his care in looking out that the property should not be depreciated would present another view. It is for the purpose of showing his relations to the bank and his ownership of the stock, we maintain, has a bearing upon his good intent with reference to the purchasing of these

securities for the bank and in dealing with the bank's funds. It makes a little difference whether he owned all of the stock or did not own any of it.

Mr. BRANCH: Not the slightest. It has no bearing upon his *bona fide* intent to use them for the benefit of the bank.

Mr. STREETER: I do not care to argue that question now.

The COURT: Without regard to that, the rule in this court is that the cross-examination shall be limited to the subject-matter of the direct, and even if that is something which it is competent to show in your case I do not think it is competent to be brought out in this way.

Mr. STREETER: Your ruling has been that on the question of intent the door is pretty wide open. This witness has been produced here for the purpose of showing facts from which intent might be drawn. That is a material question, and it is upon that same
131 question that I put this inquiry—the question of intent.

The COURT: I do not say how I shall rule when this evidence is offered at the proper time. The Government has not opened up affirmatively the ownership of stock.

Mr. STREETER: The question of intent has been opened up.

The COURT: I don't think it is worth while to argue the question."

(Record, pp. 76, 77.)

12. The circuit court has erred in denying the defendant's motion to direct a verdict for the defendant on the seventh count, as appears by the following:

"At the close of the Government's case the defendant's counsel made the following motion:

'Circuit Court of the United States, District of New Hampshire.

UNITED STATES
v.
WARREN F. PUTNAM. } No. 479, Criminal Docket.

The court having determined and notified the counsel for both parties that he should direct or request a verdict for the respondent upon all the counts in the indictment except the first, second, and seventh, the respondent now renews his motion that the court direct or request a verdict for the defendant upon the seventh count:

1st. Because the evidence of abstraction is not sufficient to warrant a verdict against the defendant.

2nd. Because of the variance between the allegations in the indictment and proof of place where the alleged offence was committed.

3rd. Because the bill of particulars submitted by the Government to respondent's counsel December 11, 1894, gave notice that the Government under this count would rely solely upon the abstraction of moneys by means of the checks set forth in said bill of particulars, all of which were drawn by the respondent in Boston upon the National Bank of Redemption in Boston and paid by the said

National Bank of Redemption in the city of Boston, and because the Government has introduced no evidence that the alleged offence of abstraction or any essential element of said offence was committed elsewhere than in the city of Boston, outside the jurisdiction of this court.

4th. Because the several offences of abstraction as alleged in said seventh count and in the bill of particulars were finally completed by the payment of the checks at the National Bank of Redemption, in the city of Boston, not within this district, and because there is no evidence that any essential part of the offence charged was committed within this district.

(S'g'd) WARREN F. PUTNAM,
By his attorneys, STREETER & WALKER.

Filed Dec. 27, 1894.'

"The evidence adduced by the Government in support of the seventh count tended to prove the following facts:

"The bank at Exeter kept an account with the National Bank of Redemption, in Boston, Massachusetts, which was designated by the term 'reserve agent.' From time to time deposits were made and checks were drawn by the bank at Exeter on this account.

"Upon the 1st and 16th of each month statements called reconciliation sheets showing deposits and checks on this account, were sent by the reserve agent to the bank at Exeter. The cashier of the latter compared the items on the reconciliation sheets with the account on his books, and if the two coincided he so notified the cashier of the reserve agent, and the account was considered settled to that time. If the accounts did not agree, the discrepancies were noted and finally adjusted by correspondence between the two cashiers.

"Evidence was admitted, subject to defendant's exception, tending to show that at a meeting of the directors of the bank at Exeter, held about one year prior to the alleged unlawful drawing of checks by the defendant at Boston, a vote had been passed by the board of directors that no one but the cashier should thereafter have authority to draw checks against the account with the reserve agent; that the defendant was present at that meeting and acted as clerk of the board.

"Such a vote was never recorded in the directors' records and the reserve agent was never notified of it.

"The checks mentioned in Mr. Branch's letter to Mr. Streeter dated Dec. 11, 1894, to the seventh count were all drawn in Boston between Jan. 16 and May 6, 1893, both inclusive. They were delivered to the payees thereof in Boston in return for cash or funds in the form of checks or drafts. The checks drawn by the defendant were put into process of collection through various national banks in Boston, and, having duly passed through the Boston clearing-house, were paid by the National Bank of Redemption at Boston out of funds in its hands belonging to the bank at Exeter, and proper entries were made upon the books of the reserve agent debiting the bank at Exeter and crediting itself with the amount so paid.

"Two of the checks mentioned in the bill of particulars, viz., the check dated Jan. 17, 1893, for five thousand dollars, payable to the order of the American Loan and Trust Company of Boston, signed by Warren F. Putnam, president, and that of Jan. 23, 1893, of the same amount and tenor, were produced and put in evidence by the prosecution. The evidence tended to show that the defendant delivered said checks to the payee, the American Loan and Trust Company, on the dates thereof and received in exchange for the same drafts for the same amount, drawn by the American Loan and Trust Company on Winslow, Lanier & Co., of New York. These drafts were paid by Winslow, Lanier & Co. at New York on Jan. 18 and 24, 1893, respectively, and the endorsement thereon showed that they had been used by the respondent for some purpose, the nature of which was not indicated by the evidence, except as appears from this bill of exceptions. The checks of Jan. 17 and 23, 1893, were duly presented to the reserve agent through the clearing-house, paid, and charged off as above described.

"That all of the foregoing-named checks, except the first two checks, dated Jan. 17 and 23, 1893, respectively, were drawn between the first day of April, 1893, and the 6th day of May, 1893. Neither the cashier nor the directors of the bank knew that the April and May checks had been drawn until about the 1st of May, when the reconciliation sheet with the accompanying checks were received from the National Bank of Redemption; that Putnam declined to make any explanation as to why the checks had been drawn or what he had done with the money, and the evidence tended to show that he evaded making any explanation until about the 24th of May; that then he stated to the directors that the money had been used to put into the Leavenworth Electric Railway Company and the Lexington Hydraulic Company; that at this time the amount of money which he had withdrawn from the funds of the bank amounted to about $36,000, to wit, $10,000 on January 17 and 23 and $26,000 in April and May.

"CHARLES E. BYINGTON, witness for the prosecution, testified as follows:

Q. How often did you send those reconciliation sheets?
A. Twice a month.
Q. At what time?
A. The middle and the first of the succeeding month.
Q. Did you get any checks or vouchers at the middle of the month?
A. Probably I did, the first of February.
Q. That would not be the middle of the month?
A. It would not.
Q. When did you get your vouchers back?
A. The first of the month.
Q. Did you get your reconciliation sheets twice a month?
A. Twice a month.

Q. When that reconciliation sheet came in on the first of February, 1893, do you remember about those two checks of five thousand dollars, one on the 17th and the other on the 23d of January, drawn to the order of the American Loan and Trust Company?

A. I think I do, sir.

Q. Look at those first two checks (handing witness a package of checks) and say whether or not you ever saw them before.

A. I have seen them.

Q. Where?

A. I have seen them in the National Granite State bank, at Exeter.

Q. Can you tell when or about when?

A. It was some time the first of February, 1893.

Q. Did you have any conversation with Mr. Putnam about those two drafts?

A. Yes, sir.

Q. What was it?

A. Well we were—we had given our note for ten thousand dollars to this American Loan and Trust Company some time previously to this. I asked Mr. Putnam what those were for, and he said they were to pay that loan. I asked him if I should enter it on the books as paid, and he said yes.

Q. Did you do so?

A. I did so.

Q. And credited that amount to the National Bank of the Redemption?

A. Yes, sir.

Q. Did you know those checks had been drawn till they came back with your vouchers on the first day of February?

A. No, sir; I think not.

"From all this evidence the Government contended that this conversation took place in Exeter about February 1st, 1893, when the reconciliation sheet for January came back from the National Bank of Redemption with the vouchers for that month, among which were the two checks for $5,000 each drawn January 17 and 23, respectively, and that the entry which was made by Byington, the cashier, charging off the note of $10,000 and crediting the National Bank of Redemption with the amount and allowing it on the account current was made immediately after this conversation and in accordance with Putnam's instructions so to do to the cashier.

"Some time in May following Byington discovered that the note had not been paid, and upon interrogating Putnam about it he, Putnam, stated that when he said it was paid 'he lied about it.'

"The Government offered no evidence, except as appears from this bill of exceptions, of any acts committed by the defendant within the district of New Hampshire connected in any way with the alleged unlawful abstraction.

"The court denied the defendant's motion, and the defendant excepted on the following grounds:

1. That the evidence showed that the abstraction, if committed

at all, was completed in Boston, Massachusetts, outside the jurisdiction of this court.

2. That the evidence of criminal acts committed within this jurisdiction is not sufficient to establish the jurisdiction of this court over this cause.

3. That the evidence shows that the abstraction, if committed at all, was completed, so far as the defendant was concerned, when the checks by means of which the abstraction was alleged to have been accomplished were paid by the National Bank of Redemption.

4. That the act alleged to have been committed by the defendant within this district did not constitute an offence of the character charged in the seventh count and the bill of particulars annexed thereto.

5. That there was a substantial variance between the locality alleged in this count and that indicated by the proof." (Record, pp. 78–82.)

13. The circuit court has erred in charging the jury as follows: After the judge's charge was given and before the jury retired, the defendant excepted to that portion of the judge's charge relating to the admissibility and effect of the certificates of authorization and of organization of the National Granite State Bank of Exeter.

That portion of the charge excepted to on this point is as follows:

After stating the reasonable-doubt rule, the judge said:

In order to present to you the questions involved it is necessary, perhaps, for me to read from the statute or act of Congress upon which this prosecution is based. Congress has provided the way in which this banking business shall be conducted and had provided that "every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association" shall be punished so and so. So you see that a prosecution under this statute involves the Government in the necessity of establishing a banking association, and that the respondent was an officer of such banking association.

If certain men should associate themselves together without color of authority from the General Government and pretend to do a banking business, however fraudulently they might carry it on, they would not be within the meaning of this statute. This statute is simply intended to regulate the national banking business carried on under its authority by gentlemen associating themselves together for that purpose.

"So it is incumbent upon the Government to show that there was a national bank. In other words, to show that there was a national banking association carrying on business at Exeter under the authority or at least claiming to be under the authority of the Treasury Department, and it must appear that they were doing business within the scope of that authority, and that this respondent was acting or exercising the office of president of a national bank

at the place and within the general scope of authority intended to be conferred.

"So you must find that this association of gentlemen were doing business as a national banking association, and that they were doing business within the line of authority conferred by the certificate of authorization.

"The certificate of authorization, which is one of the original papers creating this association—in other words, which authorizes a banking association at Exeter—proceeds to designate the association under the name of 'The National Granite State Bank of Exeter.'

"Now, it is objected that there is what lawyers call a variance between the proof and the language in the indictment; and there is to this extent, that the words 'of Exeter' are omitted in describing the bank in the indictment. So this certificate of authorization can only be considered by you upon the first questions I have submitted, viz.: Was there a national banking association at Exeter? Was it authorized? Was it organized? Was it doing business under the authority conferred and of the kind and character contemplated by the certificate?' If there was a bank there and they claimed to be doing business under the authority of the General Government, then it was a bank within the meaning of this statute, and if the respondent was president of it and claimed to exercise the privileges incident to such an office, he is within the meaning of the statute.

"I have said that this certificate can only be considered upon the general question whether this was a national bank at Exeter, doing business within the line of authority conferred by the court; and upon the same question you may consider the nature of their business, what they were doing, and the manner in which they were transacting the business of the alleged association.

"If you should find these gentlemen were associated together as a banking association and were at the locality and place named, acting under the general authority of the Treasury Department and within the scope of the authority conferred, then it was a banking association within the meaning of this statute to which I have called your attention.

"If the Government has succeeded in establishing these particulars, still they must go further and establish that the respondent was an officer of the banking association, because the statute is directed against bank officers in their official capacity as acting officers of a national bank.

"As I have said, the defendant claims there is a variance between the name used in the certificate of authorization and the name set out in the indictment. The variance is this: The name of the bank as created was 'the National Granite State Bank of Exeter,' while the indictment charges that the respondent was 'then and there the president of a certain national banking association then and there known and designated as the National Granite State bank, which said association had been theretofore created and organized under

and by virtue of the laws of the United States of America and which said association was then and there acting and carrying on a national banking business at said Exeter under the laws aforesaid.' Now, you will see that the variance consists in the description of the official capacity of the respondent in omitting the words 'of Exeter' from the name. Otherwise the name—set out in the indictment precisely as it is in the certificate of authorization. The further allegation in the indictment is that they were known and designated by the name therein set forth, and that they were a national banking association. The position of the respondent is that there is a variance, and there is. I instruct you that there is a variance, and for that reason you should consider this certificate of authorization simply upon the original question of whether or not there was a national banking association there.

"The Government answers this objection of variance by saying the banking association adopted and used and was generally known by a slightly different name; that the association was known and designated as the National Granite State bank, carrying on a national banking business at Exeter; and the Government has introduced evidence tending to show that the association did adopt a different name and did drop the words 'of Exeter' generally in its business and used it in the bank books, upon their check books and letterheads, and in their correspondence with the executive department of the General Government.

"If this be so, the Government may, notwithstanding the variance which I have stated, proceed against the respondent either under the name by which the association was originally christened or under the name of its adoption, provided it was so designated and so generally known by the public, including, of course, the respondent and the department of the Government under whose authority they were carrying on the business as a banking association. So, notwithstanding the fact that I say there is a variance, if you should be satisfied that this respondent was connected as president with a bank exercising the authority and privileges of a national bank and adopting and using the name of 'the National Granite State bank,' omitting the words 'of Exeter;' that they were using such name in their business; that the president understood it and designated it as such in the records and papers of the bank, and that the Comptroller of the Currency understood that they were using such a name, then he is an officer of a national banking association and responsible under the laws, providing he is guilty of improper conduct. Then you will come to what we call the merits of the case and say whether he is guilty or not.

"I will repeat: If the Government has established all this and you find that the respondent was president of a banking association acting under the authority of the General Government; that he ac-
144 cepted the position of president and assumed and exercised the duties thereof, knowing that such association had adopted the name of 'the National Granite State bank,' dropping the words 'of Exeter,' and that, being so designated, was generally known as

such and was suffered to go on doing business under such name and at the place indicated by the certificate of authorization, then he was president of a banking association within the meaning of section 5209 of the Revised Statutes, which is, as I have stated, directed against any president or other officer of a national banking association who commits a wrong within the meaning of such section.

"If you find all these questions in the affirmative, you will then come to the questions presented by the various counts in the indictment which are to be submitted." (Record, pp. 82–84)

145 14. The circuit court has erred in charging the jury as follows: After the judge's charge was given and before the jury retired the defendant excepted to that portion of the charge relating to the question of variance between the name used in the indictment to designate the bank and that proved by the certificate of authorization and organization.

That portion of the charge excepted to on this point is the same as that set out under the 13th assignment of error.

(Record, pp. 84, 85.)

15. The circuit court has erred in charging the jury as follows: After the judge's charge was given and before the jury retired the defendant excepted to that portion of the charge relating to the admissibility and effect of the evidence adduced by the Government to prove that the bank carried on business under the name of the National Granite State bank.

That portion of the charge excepted to on this point is the same as that set out under the 13th assignment of error.

(Record, p. 85.)

16. The circuit court has erred in charging the jury as follows: After the judge's charge was given and before the jury retired the defendant excepted to that portion of the judge's charge relating to the right of the Government to proceed against the defendant as president of a bank described by either of the two names, viz.,

"the National Granite State bank" and "the National

146 Granite State Bank of Exeter."

That portion of the charge excepted to on this point is the same as that set out under the 13th assignment of error.

(Record, p. 86.)

That portion of the charge excepted to on this point is the same as that set out under the 13th assignment of error.

17. The circuit court erred in charging the jury as follows. After the judge's charge was given, and before the jury retired, the defendant excepted to all that portion of the charge relating to the place where the abstraction alleged in the seventh count was committed as bearing on the question of jurisdiction and to the effect of the evidence pertaining thereto.

That portion of the charge excepted to on this point is as follows:

"Now, while the general rules laid down with reference to the other counts apply here, the inquiry is complicated by other elements which enter into the transaction. I must therefore call your attention to other claims and considerations.

This court, speaking generally, has jurisdiction only of offenses

committed in New Hampshire. So, if you should find that the abstraction complained of in this count was fully completed in Massachusetts, then it is your duty to return a verdict of not guilty; but if you should find that he is guilty of abstraction conceived and partially accomplished in Massachusetts, but finally consummated in New Hampshire, then the offense is within the jurisdiction of the Federal court in the district of New Hampshire, and your verdict should be guilty.

Now, that jurisdiction is based upon another section of the statute, which I will read, as it will be more satisfactory than a statement by myself. Section 731 of the Revised Statutes of the United States provides that 'when any offense against the United States is begun in one judicial district and completed in another it shall be deemed to have been committed in either and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein.'

"So you see, if you inquire into this under the rules I have stated and find that there was a wrongful abstraction; that it was conceived in Massachusetts and begun there, but that it was the purpose of making it complete and it was completed in New Hampshire, then it opens up the whole transaction here in this court and can be considered the same as though it all occurred in New Hampshire.

"The theory of the respondent is this: In the first place they say that nothing wrong was done, either here or in Massachusetts. Then they say if there was anything wrong in these transactions, which were, as you will remember, the making of these checks aggregating some forty thousand dollars, drawn by Mr. Putnam, as president of the bank at Exeter, and the transactions which followed such drawing—if there was anything wrong in that it was begun and completed in Massachusetts.

"The wrongful transaction of which the Government complains is that Mr. Putnam, the respondent, made checks on the National Bank of Redemption in Boston, some of them being for five thousand dollars and so on, whereby he withdrew from the funds of the Exeter bank existing there in Boston certain of their assets. Mr. Streeter argues that this was all right, that he had authority to do it, that it was an honest transaction, but, he says, if you find it is wrong it was all done and consummated in Massachusetts, and hence we have nothing to do with it here. If it was consummated in Massachusetts we have nothing to do with it, and so the respondent must be acquitted on that count.

"The Government's theory is that the transaction was not completed in Massachusetts; that, although it was commenced there, the checks drawn there, and the money received there, it was not effectually defrauding the bank of its rights until something had been done in New Hampshire, at Exeter, whereby the bank was induced, through deception or artifice, to surrender its credits.

"Now, if the acts of drawing these checks and the conversion of the money were the sole charges in the indictment it would unquestionably be an offense committed in the district of Massachusetts

and one with which we should have nothing to do here, but the charge in the indictment is the abstraction of moneys, funds, and credits. I desire to make myself understood, gentlemen. If this indictment merely charged the abstraction of money and said nothing about credits, it being conceded here that the money was withdrawn by means of these checks, it would be an offense committed wholly in Massachusetts and you would have nothing to do with it; but if under the instructions which I am about to give you find that the offense charged, which was the abstraction of moneys, funds, and credits, was not completed and had not been effectually consummated in Massachusetts, but was completed here in New Hampshire, then it would be an offense within the meaning of section 731 about which inquiry may be made here, and the question of the guilt or innocence determined upon the whole transaction.

"Mr. Branch, representing the Government, says this whole transaction in Boston, so far as the drawing of the checks and the receiving of the money was concerned, was fraudulent. He argues that the bank at a meeting had adopted a resolution providing that the president should not draw checks, and that therefore the president had no authority and the president knew he had no authority to draw checks. This becomes material if you find it was so, because if he had the authority to draw the checks and did withdraw the funds, although he may have done it for the purpose of misappropriating and abstracting the money—if he had authority to draw those checks it would become a past and completed act in Massachusetts, as you will see; but if he did not have authority, if he was acting outside of his authority and acting fraudulently, while the drawing of the checks was effectual in withdrawing the funds from the Bank of Redemption in Boston, it would not withdraw and abstract the credit of the bank in Exeter existing in its behalf in the Bank of Redemption in Boston, because, notwithstanding he drew the checks, if he had no authority to do it, the Exeter bank would still be in position to enforce its rights and receive the benefits of its credits which had been improperly and unlawfully interfered with by some unauthorized act in Boston, and while the money had gone and been misapplied the credit of the Exeter bank would be the same substantially and might be enforced. Now, then, if the respondent conceived the plan of drawing these checks, obtaining the money, and abstracting or withdrawing the credit and had the intention, at the time he drew the checks and withdrew the money, to induce the directors at Exeter, through artifice and misrepresentation, to surrender that credit, then the transaction would be a continuous one and would be within the jurisdiction of this court. So, in order to give jurisdiction here and to enable you to pass upon this question, you must find that the offence was partly committed in Massachusetts—which it is conceded was so if there was any offence—and partly here—that is, in order to give this court jurisdiction, in order to make this offence committed partly in Massachusetts and partly here, you must find that he conceived the plan not only of abstracting the moneys by

means of the checks, but of making the transaction complete and effectual by withdrawing the credit existing in behalf of the Exeter bank. So if he came into New Hampshire and through artful deception and fraudulent misrepresentation, with the intention of making the abstraction begun in Massachusetts complete, induced the officers of the bank to surrender that credit, then he is guilty under this charge, which alleges that he wilfully and unlawfully abstracted the moneys, funds, and credits of the Exeter bank.

"But if he had no such purpose, if he acted honestly with respect to the checks and got the money honestly, of course he should not be convicted; or if you find that at the time of the abstraction in Massachusetts he had no intention or scheme to make it effectual by inducing this surrender at Exeter whenever it should come to the attention of the bank officers at Exeter, then you should not find him guilty of the charge in this count.

"Something has been said about reconciliation sheets. Those are sheets, I suppose, on which the Bank of Redemption puts down the transactions involved in the banking business between that bank and the bank at Exeter, while, on the other hand, the bank at Exeter has sheets on which it keeps its transactions with the Bank of Redemption and they exchange them once in two weeks. It is claimed here that the understanding always was that if there were any errors they were corrected on such trial balances.

"If the respondent, understanding the manner of doing business, entered upon the scheme of abstracting the moneys by means of these checks, and as a part of it understood that when confronted with these balance-sheets in order to make the abstraction of the credit effectual he must induce the bank to surrender such credit, and did do that by making misrepresentations when presented with the sheet in New Hampshire, then it was a transaction begun in one jurisdiction and completed in another and within the statute to which I have called your attention.

"I have, gentlemen, endeavored to state the questions involved here, and, while I have not re-stated the general rule as to reasonable doubt which I stated in the outset, it of course applies to all the propositions which it is necessary for the Government to make out.

"You are to take the case and give it your best consideration, and pass between the respondent and the Government and say whether you are satisfied under the rules stated that he is guilty in respect to any of these counts submitted to you, viz., the 1st, 2nd, and 7th counts.

"As to this offence which I have been talking about in the last part of my instructions, when I referred to the one claimed to have been begun in Massachusetts and completed here, if you find him guilty under the rules which I have suggested, the fact that it was afterwards adjusted by his surrendering the bonds would not be an answer, and this for the reason that banks not only do business for profit to themselves, but they have the privilege of issuing currency, receiving deposits, and transacting business with the public generally, and if there was any irregularity, and if the parties undertook

to settle between the offender and the stockholders or directors, it is not an answer to a criminal prosecution and should not be so considered by you in this inquiry.

"I have given you the general rule that you may consider all his acts and doings as bearing upon the original intent. This surrendering of the bonds may be considered in connection with that, but the fact that he turned over the bonds to make up for these checks, provided you find him guilty with respect to the original transaction, is not a bar to this prosecution, and you are not relieved from passing upon the question of his guilt, although the bonds were surrendered." (Record, pp. 85, 88.)

18. The circuit court has erred in refusing a motion of the defendant in arrest of judgment, as appears by the following:

"On January 9, 1895, by leave of court granted upon motion of the defendant, the defendant filed a motion in arrest of judgment of which the following is a copy:

Circuit Court of the United States, District of New Hampshire, October Term, 1894, *ss:*

UNITED STATES
v.
WARREN F. PUTNAM.

Motion in Arrest of Judgment.

And now, after verdict, but before judgment, comes the respondent above named and moves the court that judgment upon the seventh count and specification thereon filed by the district attorney as of December 11, 1894, be arrested, and that no judgment be entered against him upon said count and specification upon the verdict heretofore rendered, for the reason that said count and specification, as appears by the record, charges the respondent with the commission of 15 distinct offences against the laws of the United States. Wherefore the respondent says that said count, with said bill of particulars, is bad for duplicity and insufficient to support a judgment.

WARREN F. PUTNAM,
By his attorneys, STREETER & WALKER."

(Record, pp. 88, 89.)

BRIEF OF THE ARGUMENT.

A.

VARIANCE BETWEEN INDICTMENT AND EVIDENCE.

There is a variance between the name used in the indictment to describe the bank of which the respondent was president, viz., "the National Granite State bank," and the name which appears by the evidence to have been the legal name of the bank, viz., "the National Granite State Bank of Exeter."

Assignments of error, Nos. 1, 2, 13, and 14, which cover this proposition, allege errors as follows:

Assignment No. 1 (Record, p. 61) assigns as error the admission of certificates of authorization and organization, as follows:

The first was a certificate of the Comptroller of the Currency containing an exemplified copy of the original certificate of the Comptroller, dated May 15, 1865, authorizing an association therein named to do business as a national banking association under the laws of the United States. The original certificate recites that "it has been made to appear that 'the National Granite State Bank of Exeter' in the town of Exeter in the county of Rockingham and state of New Hampshire has been duly organized under and according to the requirements of the act of Congress," etc., and that "'The National Granite State Bank of Exeter' in the town of Exeter," etc., is authorized to commence the business of banking. (Record, pp. 61 and 62.)

The second was a similar certificate containing an exemplified copy of the original certificate of the Comptroller, dated April 8, 1885, authorizing the extension of the corporate existence of the association therein named. The original certificate recites that "it has been made to appear that 'the National Granite State Bank of Exeter' in the town of Exeter," etc., had complied with the pro-

visions of act of congress, and that "'the National Granite State Bank of Exeter,' in the town of Exeter," etc., is authorized to have succession until April 12, 1905. (Record, pp. 62 and 63.)

The third was a similar certificate containing an exemplified copy of the original certificate of organization, dated April 12, 1865, of the association therein named. Said certificate recites that "the undersigned, the directors of the Granite State bank of Exeter in the state of New Hampshire, hereby declare that the owners of two-thirds of the capital stock of said bank have authorized the directors of said bank to make the necessary organization certificate, and to change and convert the said bank into a national association under the provisions of the act of congress;" etc., "and by virtue of said authority and in accordance with the provisions and requirements of the forty-fourth section of said Act, we do hereby make and execute this organization certificate:

"First. The name and title of this association shall be the National Granite State Bank of Exeter.

"Second. The said association shall be located and continued in the town of Exeter, county of Rockingham and State of New Hampshire, where its operations of discount and deposit are to be carried on.

"Third. The capital stock of this association shall be one hundred thousand dollars ($100,000), and the same shall be divided into one thousand shares of one hundred dollars each, as authorized by a vote of the stockholders of the Granite State bank.

"Fourth. The name and residence of each of the stockholders of the said Granite State bank, which is to become a national bank under the provisions of the act of Congress aforesaid, and the number of shares of forty dollars each held by each stockholder are as follows:

[In the exhibit a list of the shareholders of the Granite State bank, showing name, residence, and number of shares, is inserted at this point. Said list not being material to this case, can be omitted.]

"Fifth. This certificate is made in order that the said Granite State bank and the stockholders thereof may avail themselves of the advantages of the aforesaid act, and that the said Granite State bank may be changed and converted into a national banking association under the name and title of the National Granite State Bank of Exeter." (Record, pp. 63, 64.)

The fourth was the original certificate of the Comptroller, dated April 8, 1885, authorizing the association therein named to continue business until April 12, 1905. Said certificate recites that "it has been made to appear that 'the National Granite State Bank of

Exeter' in the town of Exeter," etc., "has complied with all the provisions of the acts of congress," etc.; and that "'the National Granite State Bank of Exeter' in the town of Exeter," etc., "is authorized to have succession for the period specified in its amended articles of association, namely, until close of business on April 12, 1905." (Record, pp. 64 and 65.)

This evidence was admitted *de bene*, subject to defendant's exceptions, duly taken, pending a motion by the district attorney to amend the indictment by inserting "of Exeter" after the name of the bank, as given in the indictment. After denying the motion to amend, the court instructed the jury that the certificates could only be considered upon the question as to whether there was a national banking association at Exeter, and as tending to show the character of the business which the association was authorized to do, to which instruction the defendant duly excepted.

Assignment, No. 2, (Record, p. 66) assigns as error the admission of that part of the directors' record of "the National Granite State bank," which contained a record of the organization meeting, in which is recorded "The name and title of the association into which said Granite State bank is to be changed and converted shall be 'the National Granite State Bank of Exeter.'"

Assignment, No. 13, (Record, p. 82) covers that portion of the charge relating to the admissibility and effect of the certificates of authorization and organization of the National Granite State Bank of Exeter.

That portion of the charge, which is also covered by Assignments Nos. 14, 15, and 16 (Record, pp. 84, 85), is as follows:

After stating the reasonable-doubt rule, the judge said:

"In order to present to you the questions involved it is necessary, perhaps, for me to read from the statute or act of congress upon which this prosecution is based. Congress has provided the way in which this banking business shall be conducted and had provided that "every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association" shall be punished so and so. So you see that a prosecution under this statute involves the government in the necessity of establishing a banking association, and that the respondent was an officer of such banking association.

"If certain men should associate themselves together without color of authority from the general government and pretend to do a banking business, however fraudulently they might carry it on, they would not be within the meaning of this statute. This statute is simply intended to regulate the national banking business carried

on under its authority by gentlemen associating themselves together for that purpose.

"So it is incumbent upon the government to show that there was a national bank. In other words, to show that there was a national banking association carrying on business at Exeter under the authority or at least claiming to be under the authority of the Treasury Department, and it must appear that they were doing business within the scope of that authority, and that this respondent was acting or exercising the office of president of a national bank at the place and within the general scope of authority intended to be conferred.

"So you must find that this association of gentlemen were doing business as a national banking association, and that they were doing business within the line of authority conferred by the certificate of authorization.

"The certificate of authorization, which is one of the original papers creating this association—in other words, which authorizes a banking association at Exeter—proceeds to designate the association under the name of 'the National Granite State Bank of Exeter.'

"Now, it is objected that there is what lawyers call a variance between the proof and the language in the indictment; and there is to this extent, that the words 'of Exeter' are omitted in describing the bank in the indictment. So this certificate of authorization can only be considered by you upon the first questions I have submitted, viz.: Was there a national banking association at Exeter? Was it authorized? Was it organized? Was it doing business under the authority conferred and of the kind and character contemplated by the certificate? If there was a bank there and they claimed to be doing business under the authority of the general government, then it was a bank within the meaning of this statute, and if the respondent was president of it and claimed to exercise the privileges incident to such an office he is within the meaning of the statute.

"I have said that the certificate can only be considered upon the general question whether this was a national bank at Exeter, doing business within the line of authority conferred by the court; and upon the same question you may consider the nature of their business, what they were doing, and the manner in which they were transacting the business of the alleged association.

"If you should find these gentlemen were associated together as a banking association and were at the locality and place named, acting under the general authority of the Treasury Department and within the scope of the authority conferred, then it was a banking association within the meaning of this statute to which I have called your attention.

"If the government has succeeded in establishing these particulars, still they must go further and establish that the respondent was an officer of the banking association, because the statute is directed against bank officers in their official capacity as acting officers of a national bank.

"As I have said, the defendant claims there is a variance between the name used in the certificate of authorization and the name set out in the indictment. The variance is this: The name of the bank as created was 'the National Granite State Bank of Exeter,' while the indictment charges that the respondent was 'then and there the president of a certain national banking association then and there known and designated as the National Granite State bank, which said association had been theretofore created and organized under and by virtue of the laws of the United States of America and which said association was then and there acting and carrying on a national banking business at said Exeter under the laws aforesaid.' Now, you will see that the variance consists in the description of the official capacity of the respondent in omitting the words 'of Exeter' from the name. Otherwise the name—set out in the indictment precisely as it is in the certificate of authorization. The further allegation in the indictment is that they were known and designated by the name therein set forth, and that they were a national banking association. The position of the respondent is that there is a variance, and there is. I instruct you that there is a variance, and for that reason you should consider this certificate of authorization simply upon the original question of whether or not there was a national banking association there.

"The Government answers this objection of variance by saying the banking association adopted and used and was generally known by a slightly different name; that the association was known and designated as the National Granite State bank, carrying on a national banking business at Exeter; and the Government has introduced evidence tending to show that the association did adopt a different name and did drop the words 'of Exeter' generally in its business and used it in the bank books, upon their check books and letterheads, and in their correspondence with the executive department of the general government.

"If this be so, the Government may, notwithstanding the variance which I have stated, proceed against the respondent either under the name by which the association was originally christened or under the name of its adoption, provided it was so designated and so generally known by the public, including, of course, the respondent and the department of the government under whose authority they were carrying on the business as a banking association. So, notwithstanding the fact that I say there is a variance, if you should be satisfied that this respondent was connected as president with a bank exercising the authority and privileges of a national bank and adopting and using the name of 'the National Granite State bank,' omitting the words 'of Exeter;' that they were using such name in their business; that the president understood it and designated it as such in the records and papers of the bank, and that the comptroller of the currency understood that they were using such a name, then he is an officer of a national banking association and responsible under the laws, providing he is guilty of improper con-

duct. Then you will come to what we call the merits of the case and say whether he is guilty or not.

"I will repeat: If the Government has established all this and you find that the respondent was president of a banking association acting under the authority of the general government; that he ac-
144 cepted the position of president and assumed and exercised the duties thereof, knowing that such association had adopted the name of 'the National Granite State bank,' dropping the words 'of Exeter,' and that, being so designated, was generally known as such and was suffered to go on doing business under such name and at the place indicated by the certificate of authorization, then he was president of a banking association within the meaning of section 5209 of the Revised Statutes, which is, as I have stated, directed against any president or other officer of a national banking association who commits a wrong within the meaning of such section.

"If you find all these questions in the affirmative, you will then come to the questions presented by the various counts in the indictment which are to be submitted." (Record, pp. 82, 84.)

Assignment No. 14 (Record, pp. 84, 85) covers that portion of the charge relating to the question of variance between the name used in the indictment to designate the bank and that proved by the certificates of authorization. The part of the charge covered by this assignment is the same as that given above under assignment No. 13.

The practical effect of the foregoing assignments is shown by the following statement:

Before the Government's motion to amend the indictment, by inserting the words "of Exeter" after the name of the bank therein, had been denied, (Record, p. 17) the Government produced the certificates of authorization and organization which were read in full, (Record, pp. 19, 23) and admitted *de bene*. After denying said motion the court instructed the jury to consider them only upon the question whether there was a national banking association at Exeter and as tending to show the character of the business which the association was authorized to do (Record, p. 24.) Evidence was then admitted showing that the Granite State bank was converted into a national bank by the name of "the National Granite State Bank of Exeter," said evidence being the record of the original organization meeting of the bank, contained in the book which witness testified was the record book of "the National Granite State bank." (Record, p. 24; Assignment No. 2.) No other certificates of organization and authorization were produced (Record, p. 21.) After so limiting the evidence, the court charged the jury as above stated.

Upon these facts the following propositions are submitted:

I.

PROOF OF REAL NAME.

a. The certificates having been admitted as a whole in the first instance, the proof of the real name of the bank was complete; and the subsequent instruction limiting their use as evidence could not affect the fact which was thus established.

All the certificates were admitted *de bene* to their full extent, pending the motion to amend. If that motion had been granted, the objections to their admissibility would have been obviated and their production in evidence would have been entirely proper. In the meantime they were in the case and fixed the name of the bank so firmly as to preclude the possibility of effacing it; and the instruction finally given the jury to consider them only upon the two points to which they were limited was not sufficient to apprise the jury that the name therein contained was not to be considered at all. The proper course, and the only course which would have been fair to the defendant, was for the court to have instructed the jury definitely that that part of the certificates relating to the names was withdrawn from their consideration, and that they must entirely disregard it. As the trial was conducted, it is probable that neither the jury nor the defendant's counsel understood, until the evidence was closed and the charge was given, that the *name* in the certificates was not to be considered; and an examination of the portion of the charge covered by assignment No. 13 renders it somewhat doubtful whether the court understood it himself. If he did, his charge is strangely contradictory, as it appears from "b," *infra*.

As the court failed to limit the evidence so that the jury could understand the limitation, it is submitted that for the purposes of this case it must be considered that the certificates were in the case as a whole, proving beyond question the name under which the bank was authorized to do business.

b. That portion of the charge excepted to, relating to the admissibility and effect of the certificates, is inconsistent with the previous instructions to the jury to consider the certificates only upon the question whether there was a national banking association at Exeter, and as tending to

show the character of the business which the association was authorized to do, and was in effect a positive direction to the jury to disregard the previous instructions.

That portion of the charge referred to is found in the record, pp. 82–84, and also *supra*, page 44; and a critical examination thereof fully sustains this proposition. The court begins by instructing the jury that the government must show that there was a national banking association, as alleged. He then says (the italics are ours):

"So you must find that this association of gentlemen were doing business as a national banking association, and that they were doing business within the line of authority *conferred by the certificate of authorization.*

"*The certificate of authorization, which is one of the original papers creating this association—in other words, which authorizes a banking association at Exeter—proceeds to designate the association under the name of 'The National Granite State Bank of Exeter.'*

"Now, it is objected that there is what lawyers call a variance between the proof and the language in the indictment; and there is to this extent, *that the words 'of Exeter' are omitted in describing the bank in the indictment.*" . . .

"As I have said, the defendant claims there is a variance between the name used in the certificate of authorization and the name set out in the indictment. The variance is this: *The name of the bank as created was 'the National Granite State Bank of Exeter,'* while the indictment charges that the respondent was 'then and there the president of a certain national banking association then and there known and designated as the National Granite State bank, which said association had been theretofore created and organized under and by virtue of the laws of the United States of America and which said association was then and there acting and carrying on a national banking business at said Exeter under the laws aforesaid.' *Now, you will see that the variance consists in the description of the official capacity of the respondent in omitting the words 'of Exeter' from the name. Otherwise the name—set out in the indictment precisely as it is in the certificate of authorization.*" . . .

"*The position of the respondent is that there is a variance, and there is. I instruct you that there is a variance, and for that reason you should consider this certificate of authorization simply upon the original question of whether or not there was a national banking association there.*—

"The Government answers this objection of variance by saying the banking association adopted and used and was generally known by a *slightly different name;* that the association was known and designated as the National Granite State bank, carrying on a national banking business at Exeter; and the Government has introduced *evidence tending to show that the association did adopt*

a different name and did drop the words 'of Exeter' generally in its business and used it in the bank books, upon their check books and letter-heads, and in their correspondence with the executive department of the general government.

"If this be so, the Government may, notwithstanding the variance which I have stated, proceed against the respondent *either under the name by which the association was originally christened or under the name of its adoption*, provided it was so designated and so generally known by the public, including, of course, the respondent and the department of the government under whose authority they were carrying on the business as a banking association. So, notwithstanding the fact that *I say that there is a variance*, if you should be satisfied that this respondent was connected as president with a bank exercising the authority and privileges of a national bank and *adopting and using the name of 'The National Granite State bank,' omitting the words 'of Exeter';* that they were using such name in their business that the president understood it and designated it as such in the records and papers of the bank, and that the comptroller of the currency understood that they were using such a name, then he is an officer of a national banking association and responsible under the laws, providing he is guilty of improper conduct. Then you will come to what we call the merits of the case and say whether he is guilty or not.

"I will repeat: If the Government has established all this and you find that the respondent was president of a banking association acting under the authority of the general government; that he accepted the position of president and assumed and exercised the duties thereof, *knowing that such association had adopted the name of 'the National Granite State bank,' dropping the words 'of Exeter,'* and that, being so designated, was generally known as such and was suffered to go on doing business under such name and at the place indicated by the certificate of authorization, then he was president of a banking association within the meaning of section 5209 of the Revised Statutes, which is, as I have stated, directed against any president or other officer of a national banking association who commits a wrong within the meaning of such section."

It is true that the court repeated the instruction previously given, that the jury were to consider the certificates only upon the questions to which they were originally limited; but how much attention would the jury give to this instruction in the face of the judge's remarks as given above? He disregarded his own instruction and did consider the certificates entire, name and all, and if the charge does not amount to an instruction admitting them in evidence complete, the judge was stating as facts, matters which there was absolutely no evidence to prove. For example, when he says, "The certificate of authorization which is one of the original papers creating this association—in other words, which authorized a banking association at Exeter—proceeds to designate the association under the name of 'the

National Granite State Bank of Exeter,'" he must refer to the certificates in question, as no other certificates were put in evidence, (Record, p. 24); and the other references to the certificates of authorization have the same effect. So also, the frequent allusions to the change of name from "the National Granite State Bank of Exeter" to "the National Granite State bank" by dropping the words "of Exeter," are surely of greater prominence than the instructions (which would most certainly be less intelligible to the jury) to consider the certificates only upon the question whether there was a national banking association at Exeter, and as tending to show the character of the business which the association was authorized to do. This proposition being established, then the certificates furnish absolute evidence that the correct name of the corporation was "the National Granite State Bank of Exeter."

c. There is sufficient evidence without the certificates to show that the legal name of the association was "the National Granite State Bank of Exeter."

The extract from the Record admitted, as shown in assignment No. 2 (Record, p. 24), shows that the name under which the bank organized was "the National Granite State Bank of Exeter." If the name in the certificates was not actually admitted in evidence, this was the strongest evidence upon the question of name, and it is submitted that it is conclusive upon this point. It is certainly sufficient evidence that the bank organized by that name and not by the name used in the indictment; and this amounts to a variance in that respect at least. And under the authorities upon the question of variance, given below, this is error.

But it is submitted that this evidence when considered in connection with the other evidence that was admitted, viz., that the bank in some instances used the name of "the National Granite State Bank of Exeter" in connection with its business, and that part of the checks were signed by Putnam as president of "the National Granite State Bank of Exeter," amounts to positive proof that the real name under which the bank was created, organized, and was doing business, was different from that alleged in the indictment.

d. All the evidence, including the certificates as treated by the court in the charge, is decisive to show that the name by which the association was created and organized was different from that alleged in the indictment.

This proposition includes all the foregoing propositions and is founded upon the same reasons. It is only necessary to quote from the judge's charge to establish beyond question that the name by which the association was created and organized was "the National Granite State Bank of Exeter," and not "the National Granite State bank," as alleged. He says (Record, p. 82.)

"The certificate of authorization, which was one of the original papers creating the association—in other words, which authorized a banking association at Exeter—proceeds to designate the association under the name of 'the National Granite State Bank of Exeter.'"

And again (Record, p. 84)

"The name of the bank as created was 'the National Granite State Bank of Exeter'" . . . "Now you will see that the variance consists in the description of the official capacity of the respondent in omitting the words 'of Exeter' from the name, otherwise the name is set out in the indictment precisely as it is in the certificate of authorization."

If either of these propositions is established, the authorities are decisive to show that there was a fatal variance.

II

VARIANCE DEFINED.

"*Variance is any such partial lack of harmony between an essential averment, or a non-essential one in a form precluding its rejection, and the evidence, as renders the proof inadequate.*"

Bishop's New Criminal Procedure 484 a, 3.

a. It is invariably held that where the name of a third person is introduced in an indictment, as descriptive of some person or thing, the name must be proved as laid.

This statement is quoted from *State* v. *Copp*, 15 N. H. 216, and is fully supported by cases arising upon diverse facts and in many jurisdictions. A few instances of this sort are as follows:

Where defendant was indicted for larceny of cloth, alleged to have been the property of "T. Prentiss," and the proof showed that it was the property of "T. Prentiss & Co.," it was held a fatal variance. *State* v. *McCoy*, 14 N. H. 364.

So also where the defendant was indicted for assaulting Frank Blackburn and the jury found a special verdict that he was guilty of assaulting "Edward Blackburn."

Million v. *People*, 6 Bradw. (Ill.) 537.

So also where defendant was indicted for forgery of a bank note which was set out in full, and the name of the president was given as "Sedbetter," while the proof showed that it should have been "Ledbetter." *Zellers* v. *State*, 7 Ind. 659.

So also where the defendant was indicted for larceny of "Stephen B.'s" property and the proof showed that it was "Samuel B.'s."

People v. *Hughes*, 41 Cal. 234.

So also when defendant was indicted for perjury in a criminal proceeding against "John Green" and the proof showed that the proceeding was against "G. Green."

State v. *Green*, 100 N. C. 547.

In this case the court say:

"It would be unjust to so charge him (the respondent) with a particular crime as to mislead him in his defense, or as to render it difficult for him to make his defense in case of a subsequent prosecution for the same offense. The law is careful to guard against this, and hence the strict rule of pleading in criminal actions, that in some cases seem to be unnecessarily strict, and to serve no useful purpose. They are wisely devised, and intended to prevent possible wrong and injustice in matters very important to every one who may be charged with serious offenses."

See for further examples

Hensley v. *Commonwealth*, 1 Bush. (Ky.) 11;
Mathews v. *The State*, 33 Tex. 102;
Livingston v. *State*, 16 Tex. App. 652;
People v. *Frank*, 1 Idaho, N. S. 200;
Regina v. *Dent*, 2 Cox Cr. Cas. 354;
Regina v. *Carter*, 6 Mod. 168.

The reason generally given for the strictness of this rule is that stated by the North Carolina court in *State* v. *Green*, *supra*, but the rule is closely allied to the "descriptive averment" rule which is so admirably stated by Judge Story in *U. S.* v. *Howard*, 3 Sumn. 12, as follows:

"But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage."; that is, such allegations must be proved as laid.

Authorities upon this question of descriptive averment are given at length in this brief at c. infra p, page 68, where the subject is elaborated.

b. (1) The name is surely "descriptive of the identity" of this corporation, and (2) the bank in this case is surely "that which is legally essential to the charge."

(1). The name is descriptive of the identity of a corporation.

This proposition is sustained by the authority of centuries.

Bacon's Abr. Title Corporations, C. 1, is squarely in point.

"The Names of Corporations are given of Necessity; for the Name is, as it were, the very Being of the Constitution; for though it is the Will of the King that erects them, yet the Name is the Knot of their Combination, without which they could not perform their Corporate Acts; for it is no Body to plead and be impleaded, to take and give, until it hath got a Name."

So also in an anonymous case, 3 Salkeld, 102 (Com. Bench, 1697) it was held that a corporation by charter could not have "several names at the same time and to the same purpose."

So also Note to *Meller* v. *Spateman*, 1 Saund. 340, note 2.

So also the cases discussed under "c." below, which show the modern application of the rule.

(2). The existence of the bank is legally essential to the charge.

No argument can be necessary upon this point, and a perusal of the National Bank Act shows beyond doubt that section 5209 refers only to officers of a banking association; consequently, a banking association is an indispensable prerequisite to the commission of an offense under that statute.

c. Whenever an indictment contains a name purporting to be the name of a corporation which is involved in the consequences of the offence alleged, the name must be strictly given, and the proof must correspond to the allegations.

This is but one element of the proposition submitted above at "a" page 52, that where the name of a third person is introduced into an indictment as descriptive of some person, it must be proved as laid; and the authorities show that this rule is even more strictly applied to corporations than to persons. In some jurisdictions it is held that when a name is used as descriptive of a *person*,

it is permissible to show that the person referred to is commonly known by the name used in the indictment; but no authority has been found extending this exception to corporations.

The explanation for this distinction is found in the difference between a real person and a corporation. The latter is an inchoate, artificial entity, which has no material existence, but is a mere creation of law, and can be known and designated only by the name given it by the law creating it. A natural person, however, is an actuality regardless of name, and could exist without any name at all; and so far as identity is concerned, a person may as well be described by the name which he is commonly known by amongst his fellow-men, as by that which was bestowed upon him in the first instance. This distinction stands upon authority as well as upon reason. As Bacon says,

"For the name is, as it were, the very Being of their Constitution . . . the Knot of their Combination, without which they could not perform their Corporate Acts; for it is no Body to plead and be impleaded, to take and give, until it hath got a name."

Bacon's Abr. Title Corporations, *c.* 1.

Accordingly it was held that a corporation could not have "several names at the same time and to the same purpose."

Anonymous, 3 Salk. 102 (1647).

The theory that the name is of the very essence of corporate existence has been consistently followed both in this country and in England, in most, if not all the criminal cases where it has been considered; and the doctrine is also sustained by many civil cases as well.

In England the cases are quite numerous and are strictly in point.

In *Rex* v. *Morris*, 1 Ld. Raym. 337 (1690) a mandamus was quashed because it was to the Mayor, etc, "of the city of Lincoln in the county of Lincoln," whereas it should have been "in the county of the city of Lincoln."

So also a declaration was held to be bad where the plaintiff declared upon a contract for stock in the South Sea Company trading "*ad mari Austrial*" when it should have been "*ad mari Austral*," without the "i."

Turvil v. *Ainsworth*, 2 Strange 787 (1727).

So also where a writ was brought in the name of "Chancellor and Scholars of the University of Cambridge" when the correct

name was "Chancellor, *Magistrates* and Scholars" it was held that the name must be strictly pursued in writs and actions. *University of Cambridge* v. *Crofts*, Gilbert's Cases 248.

The *King* v. *Patrick*, 1 Leach 287 (before *Buller*, J., 1783), was an indictment for destroying trees alleged to be the property of A., B., and C., "then being Churchwardens of Enfield." It appeared in evidence that the trees belonged to a corporation (of which A., B., and C. were the only members) which was properly named "the Churchwardens of the Parish church of Enfield, in the County of Middlesex." Held, that the correct corporate name should have been given.

In *Queen* v. *West*, 2 Eng. Ry & Can. Case, 613 (Excheq. 1841), the court (Lord *Denman*, C. J.) quashed a coroner's inquisition upon the death of three persons who were run over upon a railroad, because it described the engine and carriage causing the death as the goods and chattels, and in possession of "The Proprietors of the Hull and Selby Railway," whereas the railway was incorporated as "The Hull and Selby Railway Company."

In *Queen* v. *Registrar*, 10 Ad. & El., N. S., 839 (Qu. B. 1847), the question of a change of name by a corporation is considered at some length. That was a Petition for mandamus to compel the Registrar of Joint Stock Companies to register a vote of the corporation changing the name. Held, that in the absence of statute, a corporation cannot change its name. Lord *Denman*, C. J., says:

"The identity of name is the principal means for effecting that perpetuity of succession with members frequently changing, which is an important purpose of incorporation. And, though the King by his prerogative might incorporate by a new name, and the newly named corporation might retain former rights, and sometimes its former name also, it never appears to be such an act as the corporation could do for itself, but requires the same power as created the corporation . . . ."

"It is obvious that the title to shares, and the liability on contracts and the right to assets, would be likely to be brought into confusion if the name was subject to change; and, though there may be no danger of such confusion in this case, yet our decision must be on the general principle."

This case seems effectually to dispose of the theory of the government in this case that this bank could change its name by carelessly ignoring two of the words which are included in the name adopted by it at its inception (vote of directors, Assignment No. 2), and conferred upon it by law. This subject is considered at length, *infra*, p. 78, "d."

d. **The United States cases are decisive to the effect that the name of a corporation must be proved exactly as laid; and that the least variance is fatal.**

Mr. Wharton, in his work on "Criminal Evidence," in speaking of the use of names in indictments, says:

"The name of a corporation must be correctly given and must be proved as laid." Wharton's Crim. Ev. 102, *a.*

This proposition is sustained by many cases in the courts of the several states as well as in the federal courts. For example, in *White* v. *State*, 24 Tex. App. 231, it was held that an indictment was defective which charged the defendant with stealing and carrying away 150 pounds of coal "of the property of the Mo. P. Rway Company . . . without the consent of the said Mo. P. Ry. Company," on the ground that the variance was apparent from the indictment itself. The case is decided upon the general principle quoted from Mr. Wharton that "when a name of a corporation is given, the corporate title must be strictly pursued unless specification is made unnecessary by local statute."

See also *Thurmond* v. *State*, 17 So. West. 1098 (Tex.).

In *Lithgow* v. *the Commonwealth*, 2 Va. Cas. 297 (1822), which was an indictment for embezzling funds alleged to have been the property of "the President, Directors & Co. of the Farmers' of Virginia" (omitting the word "Bank" after "Farmers'"), the court sustained the conviction on technical grounds. But they say, at p. 306,—

"For had it, in the trial, been attempted to maintain the issue upon this count, by showing property in the President, Directors & Co. of the Farmers' *Bank* of Virginia, such testimony must have been rejected for the variance. And then, if the Commonwealth had not adduced proof of property in the President, Directors & Co. of the Farmers of Virginia, which could not have been done without showing their capacity to hold, the court must have instructed the jury that the count was not supported."

State v. *Waters*, 3 Brevard 507 (So. Car. 1814) was an indictment for forgery of a bill alleged to have been issued by "The President and Directors of the Bank of South Carolina." The bill produced showed the name to be "The Bank of South Carolina." This was held to be a fatal variance, the court saying,—

"The name of a person or body corporate, on which a paper is forged, ought to be set out with exact precision."

The foregoing cases are interesting as showing the uniform disposition of our courts to recognize this general principle; and while the courts in which they are decided are not generally considered of the highest authority, yet their decisions are of considerable value as a guide in a jurisdiction where the point has never been decided. The case might well be submitted upon these authorities with entire confidence in the result; but fortunately the same question has been fully considered and decisively settled in courts of the highest authority.

Newby v. *The Oregon Central Ry. Co.*, Deady 609 (U. S. Cir. Ct. Dist. Oregon, 1869), though not directly in point, contains some most valuable suggestions bearing upon the reasons for the universal strictness in dealing with corporate names. That was a suit to enjoin the defendants from using a corporate name which was already being used by the complainant. In overruling defendants' demurrer, the court says,—

"By the execution and filing of these articles, the corporate name assumed thereby and specified therein, becomes exclusively appropriated."

"Under the law, the corporate name is a necessary element to the corporation's existence. Without it, a corporation cannot exist. Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of the corporation."

United States v. *Denicke*, 35 Fed. 407 (U. S. Cir. Ct. Dist. Georgia, 1888), was an indictment against a post-office official for embezzling a letter alleged to have been directed to the treasurer of "The Travellers' Insurance Company." The proof showed that it was directed to the "Traders' Insurance Company," and it further appeared that there was no such corporation as the "Traders' Insurance Company." In deciding that this is a fatal variance, the court say,—

"However guilty might be the prisoner, it would be impossible to enforce the law with such a variance in pleading and proof as this, . . . The allegation being that the letter was directed to the treasurer of the Travellers' Insurance Company, and the letter showing that it was directed to the Traders' Insurance Company, furnishes as complete and unanswerable an offence against the rule as can be found. A charge of embezzlement of the property of the Central Railroad & Banking Company would be as well sustained by proof of theft from the Georgia Railroad & Banking Company."

In *Commonwealth* v. *Pope*, 12 Cushing 272, it is held that in an indictment for wilfully obstructing an engine passing upon a rail-

road alleged to have been built by the Boston & Worcester Railroad Company, it is a fatal variance if the true name is the "Boston & Worcester Railroad Corporation."

We now come to the two cases which are apparently decisive of the questions arising in this case. The first is *McGary* v. *The People*, 45 N. Y. 153, a case in the court of appeals of New York, decided in 1871. The defendant was indicted under a statute for setting fire to a woolen mill alleged to belong to "the Phœnix Mills Company, a corporation duly organized under the statutes of the state of New York, as a Manufacturing Company." At the trial, the certificate of incorporation of a company by the name of "the Phœnix Mills of Seneca Falls" was admitted, and evidence was introduced to show that the corporation in question did business and was commonly known by the name used in the indictment. It was, however, held that the difference in the name alleged and that proved by the certificate was a fatal variance, and that evidence of the ordinary name was inadmissible.

The court (*Allen*, J.) says:

"The misnomer of the corporation owning the property which was the subject of the arson was not the result of ignorance of, or inability to learn, its true name. It had become incorporated only about eighteen months before the indictment was found, and the certificate of incorporation was of record in the clerk's office of the county, and accessible to the grand jury and prosecuting officer."

"The record evidence of the existence of the corporation, given upon the trial, and then supposed to be necessary in support of the indictment, would, had it been produced before the grand jury, have prevented the mistake, and avoided the very serious and embarrassing question now presented."

"It is conceded that the averment of ownership of the property injured was a necessary and substantial part of the indictment, and that without it the indictment would have been defective." . . .

"No allegation which is descriptive of the identity of that which is essential to the charge in the indictment can be rejected, and the name of the person in whom the property which is the subject of the charge is laid, or on whom the offence is stated to have been committed, must be proved according to the indictment. (2 Russ. on Crimes, 788, 789.)" . . .

"But the more important question is whether a corporation created and existing under the laws of this state can, in legal proceedings, be known by two names. That it would have been proper to aver the ownership of the property by the true name is not denied, and if the conviction is sustained, it will follow that the corporation may have two names, by either of which it may be known and called in legal proceedings indifferently. . . . The only

means of identifying a corporation aggregate is by the name. The members are liable to change, and it can only be known by its name. The prosecutor here very properly gave the record evidence of the creation of the corporation, but was forced to explain his own record by parol and show that another corporation, a corporation under a different name, had taken the place of that originally incorporated. His evidence was not in answer and to avoid the effect of evidence given by the accused, but to get rid of a record put in evidence by himself and necessary to his case. The prosecutor conceded the necessity of proving the identity of the corporation, and as that did not result from the identity of the names he sought to establish it by reputation."

"A corporation cannot, except as authorized by law, change its own name, either directly or by user. (*Queen* v. *Registrar*, 10 Q. B., 839.) It cannot do such an act for itself. Neither can the public give it a name other than that of its creation, that is, a name by which it can be recognized in judicial proceedings."

"A corporation may, very likely, so adopt a name, in the transaction of its business, as to be made liable in its true name upon transactions in its assumed name; but it must then be sued by its true name. . . ."

"A difference is recognized between a misnomer of a corporation in judicial proceedings, and in obligations, grants, etc.; and while in the former it will be fatal, effect may be given to the latter, notwithstanding the misnomer." . . .

"The accused had no opportunity to object to the misnomer upon the trial. He could not plead it in abatement or otherwise; but, upon the traverse of the indictment, the proof of the corporation, as alleged, was upon the prosecution, and the variance was fatal."

In *Sykes* v. *People*, 132 Ill. 32, 1890, defendant was indicted under a special statute in relation to warehouses for defrauding "the Merchants' Loan and Trust Company, the same then and there being a corporation organized and incorporated under and by virtue of the laws of the State of Illinois" by means of fictitious warehouse receipts. The name of the corporation was set out in the same words whenever it appeared in the indictment, and was the same name as Sykes himself actually used in the warehouse receipts. The prosecution, for the purpose of proving the due organization and incorporation of the company, as alleged, read in evidence the charter, being a private act, in which certain persons therein named are incorporated by the name and style of "The Merchants' *Savings*, Loan and Trust Company," and confers upon them certain powers. The prosecution also put in evidence the record of a meeting of the Company at which a resolution was adopted to change the name of the corporation to "The Merchants' Loan and Trust Company," in accordance with the provisions of a statute

which was supposed to authorize such a change. The evidence also showed that for several years the corporation had been known by and had done business under the name used in the indictment and no other.

The defence set up the variance between the indictment and the proof, but the prosecution insisted that the name had been changed, that this was no material variance, and that the defendant was estopped to set up the real name of the corporation.

The court held:

1. That the proceedings for changing the name were void.
2. That as the indictment alleged that the corporation was duly organized, it was incumbent upon the prosecution to prove the fact.
3. That there was a material variance.

The Court (*Bailey*, J.) say:

"The name of said corporation therefore had not been changed, and the indictment should have described it by its name as given by the act of incorporation. It cannot be doubted that the difference between that name and the name alleged is such as to constitute a clear and material variance." p. 44.

In answer to the argument that the evidence of user sustained the indictment, the court say:

"It is not necessary for us to determine whether a corporation may not acquire a corporate name by user, or whether such name, when acquired, may not be a sufficient designation and description of the corporation in judicial proceedings, as the indictment not only alleges that the body defrauded was a corporation, but also that it was organized and incorporated under and by virtue of the laws of this State. This latter averment, though perhaps unnecessarily specific, was a matter of essential description of the corporation alleged to have been defrauded, and imposed upon the prosecution the burden of proving the due organization of said corporation under the laws of this State." (Quoting from *McGary* v. *People*, 45 N. Y. *sup.* p. 153.)

"In making the proof thus rendered necessary by the averments of the indictment, the state's attorney, as he was compelled to do, produced and read in evidence the act of the General Assembly by which the corporation alleged to have been defrauded was created and organized; and by that act it conclusively appears that, at the time of the commission of the offence charged, and at the time the indictment was found, the name of said corporation was materially variant from that alleged in the indictment. Even then, if the name of a corporation may, in the absence of better evidence, be shown by usage or reputation, here it was shown by the best evidence possible, viz., the act itself by which the corporation was created and named." pp. 45, 46. . . . . .

"The law undoubtedly is, that a corporation cannot, except as authorized by law, change its own name, either directly or by user."

"We are referred to no case and have been able to find none where it is held that a corporation, having a corporate name given to it by its charter, can at the same time have a different corporate name by usage or prescription. [Distinguishes cases of grants and devises.] But where it is necessary to make use of the name of the corporation in judicial proceedings, the rule is much more strict. In legal proceedings, any variation from the true name of a corporation is fatal, even though the corporation be not a party to the proceedings. 2 Bac. Abridg. Tit. Corporations, *c.* 3."

"The rule just stated is peculiarly applicable to prosecutions for crimes affecting corporations or their property."

The judgment was reversed.

The opinion in the above case is a complete argument upon nearly every question arising in this branch of the case. The only distinction is that in that case the prosecution met the issue squarely, resting the case upon a principle which, though plausible, has never been sustained, viz., that the name generally used in business may be used to describe a corporation. That case goes further than is necessary in the case at bar. There the corporation had tried to change its name permanently by legal proceedings; here, the change was occasional only, was not intentional, but the result of pure carelessness; there the wrong name was used by the defendant in the instruments by which the fraud was committed, and the only connection the corporation had with the case was as the party defrauded; here, the defendant used both names and the corporation is not only connected with the case as the alleged party defrauded, but is the owner of the property alleged to have been abstracted, and its existence as a national banking association and the defendant's official connection with it as such, are indispensable elements of the crime. Moreover, that case appears to have been earnestly contested on both sides, as the opinion shows that it was before the supreme court on different points three different times.

This case cannot be decided against the plaintiff in error without disregarding this unbroken current of authority, both English and American. Such a course is surely not demanded by the exigencies of this case, as the disaffirmance of the judgment can work no injustice, the opportunity still remaining to the government to obtain new indictments which do not violate one of the best settled rules in criminal law. And surely it is of vastly greater importance that this court should adopt principles that have been accepted as

reasonable and just in so many jurisdictions than that the carelessness of a district attorney should receive the approval which a disregard of those principles would inevitably imply. A solemn indorsement of the propositions advanced by the government would place neglect on a par with diligence, and open the door to inaccuracy and mistake in criminal pleading, under the sanction of this court. Looseness in civil pleading is a misfortune; in criminal pleading it is injustice itself.

B.

INCOMPETENT AND IMMATERIAL EVIDENCE.

a. The certificates of authorization and organization were incompetent and immaterial, as they had no tendency to prove the allegations of the indictment relating to "the National Granite State bank."

This proposition must be considered under two different conditions.

1. If the limitation of the certificates as attempted by the court was proper (which is denied); and

2. If such limitation was improper and inoperative.

1. If the attempted limitation was proper, and effectively kept from the jury the name used in the certificates, then the certificates had no tendency to prove the allegations. These certificates, under such circumstances, would have tended to prove merely that authority was granted in 1865 to an association to carry on business as a national banking association at Exeter; but if the attempted limitation was proper and effectual, the association referred to was not designated in the proof in that manner which the law recognizes as the only designation, viz., a name; and it did not, and could not, with the name unproved, appear from the evidence that the bank referred to in those mysterious certificates ever did business at all.

The only reason why the court attempted to limit the admission of the certificates was to prevent a variance (Record, p. 83). In the absence of any further information, the conclusion would be inevitable that the name in the certificates was different from that in the indictment, and that the certificates were *not* issued to the "National Granite State bank." And this conclusion is, of course, correct, in the light of the certificates themselves, as considered by the court

in the charge. The name being different, the certificates could have no tendency to prove the authorization and organization of the "National Granite State bank," and were consequently incompetent and immaterial. This must be so, whatever name appeared in the certificates, it being absolutely established by the very instructions which attempt to avoid the variance, that the name appearing in the certificates was different from the name in the indictment. That instruction furnishes conclusive proof of its own inefficiency.

2. If the limitation attempted to be imposed upon the admission of the certificates was improper, then they were admitted for every purpose, and establish that the name used therein was different from that alleged; so that the effect of the evidence was the same, whether the limitation was correct or not.

The authorities given here under "A," (ante) are as applicable to these propositions as to that under which they are cited. If "descriptive averments" must be proved as laid, the evidence which would not prove them, but would disprove them, would be incompetent. It was incumbent upon the government to prove the creation and organization of "the National Granite State bank." This evidence actually proved the organization of some other bank, or at least, a bank with a different name. It is then irrelevant.

b. The record of the organization meeting, which showed that the Granite State bank was changed and converted to a national banking association under the name of "the National Granite State Bank of Exeter," was immaterial and incompetent, as it had no tendency to prove the allegations of the indictment in relation to the "National Granite State bank."

It is apparent that this is really the same question as that presented by "a" *supra*, but that this is free from any of the difficulties which encumber that point.

The real question in each of the foregoing propositions is whether, under an indictment for an offence concerning a corporation, the name used in the indictment must be proved exactly as laid. If it must, then evidence of any other name is clearly immaterial. Many of the cases cited herein under "A", *supra*, present exactly the question of the admissibility of such evidence, and the real principle involved is considered in all of them. That question is, "Must the name of a corporation be proved as alleged ?"

C.

FAILURE TO PROVE CREATION, ORGANIZATION, AND EXISTENCE OF THE BANK NAMED IN THE INDICTMENT.

1. The allegations in the indictment relative to the creation, organization, and existence of "the National Granite State bank" were material and should have been proved as laid.

2. The allegations relative to the creation, organization, and existence of the bank by the name alleged were not proved at all.

3. The evidence adduced by the prosecution to show that a bank at Exeter was doing the business of a national banking association under the name of "the National Granite State bank" was incompetent and immaterial, inasmuch as no legal evidence was introduced to show the creation and organization of a bank of that name, the best evidence being certificates of authorization and organization, which were not produced.

4. The court erred in that portion of the charge relating to the admissibility and effect of the evidence to show that the bank did business under the name of "the National Granite State bank."

Assignments of errors, Nos. 3, 4, 5, and 15, which cover each of the propositions under this head, allege errors, as follows:

Assignment No. 3 (Record, pp. 66, 67) assigns as error the admission of the record of the by-laws of "the National Granite State bank" to show that the bank did business under the name set out in the indictment.

Assignment No. 4 (Record, pp. 67–70) assigns as error the admission of various papers and documents introduced to show that there was a bank at Exeter doing business under the name of "the National Granite State bank."

Assignment No. 5 (Record, p. 70) assigns as error the admission of the testimony of C. E. Byington as to what other banks were doing business at Exeter at the time of the suspension, and also at the time the indictment was returned by the grand jury, and to give the names thereof.

Assignment No. 15 (Record p. 85) covers that portion of the judge's charge relating to the admissibility and effect of the evidence adduced by the government to prove that the bank carried on business under the name of "the National Granite State bank." The portion of the charge excepted to on that point is the same as that set out under Assignment No. 13, *supra*, p. 44.

The practical effect of these assignments is shown by the following statement:

Before the government's motion to amend the indictment by inserting the words "of Exeter" after the name of the bank therein had been denied (Record, p. 17), it introduced certain certificates which were read in full (Record, pp. 19, 23), and admitted, *de bene*. After denying the motion, the court instructed the jury to consider them only upon the question whether there was a national banking association at Exeter and as tending to show the character of the business which it was authorized to do (Record, p. 24). Evidence was then admitted showing that the Granite State Bank was converted into a national bank by the name of "the National Granite State Bank of Exeter," said evidence being the record of the original organization of the bank contained in a book which the witness testified was the record book of "the National Granite State bank." (Record, p. 24, Assignment No. 2). No other certificates of organization and authorization were put in evidence (Record, p. 24). Thereupon the evidence excepted to, as covered by these assignments, viz., evidence whose only effect was to show that there was a bank at Exeter doing business as a national banking association, but which did not even pretend to be proof of creation or organization, was admitted, subject to exception duly taken; and it also appeared that the same bank in some instances did business under the name "National Granite State Bank of Exeter" (Record, p. 27), and part of the checks were signed by Putnam as "President of the National Granite State Bank of Exeter." (Record, p. 28). The court charged in effect that the evidence relative to the bank's doing business under the name alleged was sufficient to justify the jury in finding that such business was

done under the certificates of authorization and organization introduced, and that, if they so found, the defendant might be convicted under this indictment. Upon these facts the foregoing propositions are asserted and it is maintained that they are fully supported by the authorities hereafter cited.

1. The allegations in the indictment relative to the creation, organization, and existence of "the National Granite State bank" were material and should have been proved as laid.

Each count alleges that the defendant as "president of a certain national banking association then and there known as designated as the National Granite State bank, which said association had been theretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking business at said Exeter under the laws aforesaid," committed certain offences. That portion of the counts to the effect that "said association had been theretofore created and organized under and by virtue of the laws of the United States" is distinct and specific. The laws of the United States referred to are found in the "National Bank Act" (Act of congress approved June 3, 1864; U. S. Revised Statutes, Title LXII), and the creation and organization of the bank should have been proved as therein provided.

***a.* In an indictment for an offence affecting a corporation, the fact of incorporation must be alleged and proved.**

DeBow v. *The People*, 1 Denio (N. Y.) 9;
State v. *Murphy*, 24 Atl. Rep. 473 (R. I.);
Wallace v. *The People*, 63 Ill. 451;
White v. *The State*, 24 Tex. App. 231;
Thurmond v. *The State*, 17 So. West. 1098 (Tex.).

***b.* Allegations of creation and organization of a corporation must be proved as laid, in both civil and criminal cases.**

Owen v. *Shepard*, 59 Fed. Rep. 746 (Cir. Ct. of Appeals, 8th Cir.);

Porter v. *The State*, ex. rel. Dunkleberg, 40 N. East. 1061 (Ind.);
Morawetz Priv. Corp. Sec. 37;
Sykes v. *The People*, 132 Ill. 32 (*sup.* p. 60).

c. This is the rule even where the allegations are immaterial; *a fortiori* where they are material as they are here.

There can be no doubt under the authorities that the allegations of creation and organization are absolutely essential in this indictment; but even if they were not, the prosecution would be obliged to prove them exactly as laid under the "descriptive averment" theory.

Bishop Crim. Proc., Sections 485, 486, 487;
United States v. *Howard*, 3 Sumn. 12;
State v. *Copp*, 15 N. H. 212;
United States v. *Brown*, 3 McL. 233;
Commonwealth v. *Stone*, 152 Mass. 498.

A descriptive averment, according to these authorities, consists of a particular description of the subject matter of some material allegation, and even if it is itself entirely immaterial so far as the offence alleged is concerned, it must be proved as laid.

2. The allegations relative to the creation, organization, and existence of the bank by the name alleged were not proved at all.

3. The evidence adduced by the prosecution to show that a bank at Exeter was doing the business of a national banking association under the name of "the National Granite State bank" was incompetent and immaterial, inasmuch as no legal evidence was introduced to show the creation and organization of a bank of that name, the best evidence being certificates of authorization and organization, which were not produced.

4. The court erred in that portion of the charge relating to the admissibility and effect of the evidence to show that

the bank did business under the name of "the National Granite State bank."

a. In general, incorporation is proved by showing the certificate of incorporation, the corporate minutes proving the organization by a corporate meeting, and the user of the corporate name in business.

This proposition is quoted from Cook on Stock and Stockholders, section 753, and is as well supported by authority as by common sense. On this point see

Owen v. *Shepard*, 59 Fed. Rep. 746;
Porter v. *State*, 40 N. East. 1061;
Sykes v. *The People*, 132 Ill. 32 (*sup.* p. 69).

This principle is recognized by the circuit court in this case. He in effect instructed the jury that they were to look at the certificates of authorization which were admitted in order to decide whether the government had discharged the obligation imposed upon them to prove the creation and organization; and he in effect says that the evidence covered by assignments Nos. 3, 4, and 5 is admissible simply to show that an association was *acting* as a national banking association within the scope of the authority conferred by the certificates. It is submitted that the instruction is erroneous so far as it allows the jury to consider these certificates at all, and this point is considered herein at "B" (page 63 et seq.); but the underlying principle that certificates of authorization and organization must be produced is undoubtedly correct.

The strongest possible authority for this proposition is found in the U. S. Revised Statutes, section 885, where congress recognizes the necessity for proving these facts and provides the manner in which it shall be done.

"SECTION 885. Copies of the organization certificate of any national banking association, duly certified by the comptroller of the currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate."

b. The government produced no legal evidence in proof of creation and organization of the banking association named in the indictment; and that portion of the charge relating to the admissibility and effect of the evidence which was directed to the point, was erroneous.

There were three separate facts which it was incumbent upon the government to prove in support of the allegations in the indictment, viz.:

First. That a national banking association was created under the laws of the United States by the name of "the National Granite State bank."

Second. That the association was organized in accordance with its creation under the name by which it was authorized.

Third. That it carried on business according to the terms of its creation and organization.

The only evidence produced in proof of the first fact were the certificates which every one knew were the certificates of authorization of "the National Granite State Bank of Exeter." In order to avoid this manifest variance, the court attempted to rule out that part of the certificates which related to the name of the association therein referred to. The proof thus limited merely showed that a bank was authorized to do business at Exeter; but as this evidence did not show that the business was to be done under any particular name, there could be no connection whatever between the evidence thus adduced and the allegations. In other words, this evidence, as admitted, had no tendency to prove the allegations of the indictment referring to "the National Granite State bank." (Assignment, No. 1.)

As the name was not admitted (under the original ruling of the court, which as we submit was modified in the charge so as to admit the name, and thus make it a clear case of variance), there was absolutely no evidence to connect the certificates with the association in question. Surely, the creation and organization of the association referred to in the indictment was not proved by showing that authority was granted to an association in 1865, to do business at Exeter, when the name of the association to which such authority was granted did not appear; and it is submitted that the evidence,

as adduced and as limited, could have no bearing upon the allegations of the indictment. Such evidence certainly had no tendency to prove the allegation relating to "the National Granite State bank," and surely was insufficient to justify the jury in finding the fact of creation and organization as alleged. The mere statement of the contrary proposition furnishes its own refutation.

The evidence produced in proof of the second fact, viz., organization in accordance with the creation under the name by which the association was authorized, was the record, said to be in the record book of "the National Granite State bank," of the organization meeting of said bank; but that evidence showed that the name under which the association was organized was "the National Granite State Bank of Exeter"; surely this had no tendency to prove the allegations relating to "the National Granite State bank," in addition to being a clear case of variance. (See *ante*, p. 51.) The certificates of organization are open to precisely the same objection as are the certificates of authorization.

The third fact was the only one of the three which was sustained by the evidence. And even this is open to the objection that the evidence did not show that the association was doing business under the name conferred upon it at its creation and organization, because it did not appear as the evidence was limited, what name it was created under, and *did* appear that it was organized under a different name.

It is, therefore, obvious that the proof adduced, which the court charged was sufficient to support the indictment, was entirely inadequate; consequently the evidence was incompetent and the charge upon that point is erroneous.

D.

THE CHARGE.

That portion of the judge's charge covered by Assignments Nos. 13, 14, 15, and 16 was erroneous in its treatment of the matter specified in said assignments.

a. That portion of the charge relating to the admissibility and effect of the certificates of authorization and organization of the National Granite State Bank of Exeter was erroneous.

This proposition is covered by assignment No. 13, and the principle involved in it is fully considered in the discussion under "A" and "B," *ante*, pp. 42–64.

b. That portion of the charge relating to the question of variance between the name used in the indictment to designate the bank and that proved by the certificates of authorization, is erroneous.

This proposition, which is covered by Assignment No. 14, is really a part of the foregoing proposition, and has been fully considered in connection therewith at "A" and "B," *ante*, pp. 42–64.

c. That portion of the charge relating to the admissibility and effect of the evidence adduced by the government to prove that the bank carried on business under the name of "the National Granite State bank" is erroneous.

This proposition is covered by Assignment No. 15, and relates to that portion of the charge set out under Assignment No. 13, at "A," *ante*, p. 44.

The court instructs the jury, in effect, that evidence to show that the bank was doing business under the name "the National Granite State bank" is admissible; and when considered in connection with the certificates of authorization issued to an association by a different name, is sufficient to support the allegations of the indictment. This evidence is surely not admissible as showing that the bank was created and organized as alleged. The best evidence of that would be certificates of authorization and organization of a bank of that name, which were not produced.

The evidence showing that the bank was carrying on business would have been admissible and probably indispensable, *after* proof of creation and organization; but it is submitted that until proof of these preliminary facts was adduced, the evidence admitted was incompetent and immaterial. The admission of such evidence under these circumstances is a clear violation of the "best evidence rule," which demands the best proof of which the subject-matter is capable; a rule which requires no citation of authority for its support.

This evidence is surely not admissible as showing that the bank was "created and organized" as alleged. The best evidence of that would be certificates of authorization and organization of a bank of that name, which were not produced.

Nor could this evidence be properly considered in connection with the certificates which were produced. If those certificates were properly so limited that the name did not appear (the only reason for such limitation being to prevent a variance), then this evidence would be inadmissible to prove any fact about the corporation named in the certificates, which were conceded to relate to a corporation described by a different name. This proposition involves the same reasons as are given *supra* "B." p. 63.

If the limitation was improper and the certificates were actually in evidence, name and all, this evidence would be incompetent for the same reason.

The conclusion is that this evidence was merely evidence on the question of name assumed by the bank in its affairs. As it is not permissible to show a change in name except in the manner provided by law, the evidence could not be competent on this ground. This question is considered in the next proposition, viz.:

d. That portion of the charge relating to the right of the Government to proceed against the defendant as president of a bank described by either of two names, viz.: "the National Granite State bank" or "the National Granite State Bank of Exeter" is erroneous.

This proposition is covered by Assignment No. 16, and refers to that portion of the charge covered by Assignment No. 13, and especially to the following portion (the italics are ours):

"The Government answers this objection of variance by saying the banking association adopted and used and was generally known by a slightly different name; that the association was known and designated as the National Granite State bank, carrying on a national banking business at Exeter; and the Government has introduced evidence tending to show that the association did adopt a different name and did drop the words 'of Exeter' generally in its business and used it in the bank books, upon their check books and letterheads, and in their correspondence with the executive department of the general government.

"If this be so, the Government may, notwithstanding the variance which I have stated, *proceed against the respondent either under the name by which the association was originally christened or under the name of its adoption*, provided it was so designated and so generally known by the public, including, of course, the respondent and the department of the Government under whose authority they were carrying on the business as a banking association. So, notwithstanding the fact that I say there is a variance, if you should be satisfied that this respondent was connected as president with a bank *exercising the authority and privileges of a national bank and adopting and using the name of 'the National Granite State bank,' omitting the words 'of Exeter;'* that they were using such name in their business; that the president understood it and designated it as such in the records and papers of the bank, and that the comptroller of the currency understood that they were using such a name, then he is an officer of a national banking association and responsible under the laws, providing he is guilty of improper conduct. Then you will come to what we call the merits of the case and say whether he is guilty or not."

We have seen that the cases establish that a corporation may not change its name except by special authority strictly pursued.

The Queen v. *Registrar*, 10 Ad. & El., N. S., 839;
Sykes v. *The People*, 132. Ill. 32;

That being so, the conduct of the officers of the association in dropping the words "of Exeter" is entirely unimportant as affecting the bank's name, which still remained, and must remain until changed under authority of law, just as it was conferred by the power which created it.

The charge, in order to avoid this difficulty, asserts that the defendant might be indicted as president of an association described by either name.

This assertion cannot be law unless

First, the actual corporate name is immaterial and may be disregarded in criminal pleadings; or unless

Second, the corporation may have two names at the same time, a chartered name and one by common usage.

The first proposition is clearly the same as that discussed under A, *supra*; and the conclusion reached there is sufficient to show that it is untenable.

The second proposition is disposed of by the cases holding that a corporation may not change its name except as provided by law.

The adoption by user of a name which should be equally suitable as a description of the corporation, and the entire disuse of the legal name, would be as effectual a change of name as could be devised. Since such a change of name could not be effected by positive action, it cannot be accomplished by indirection. So also if a corporation may by user acquire an additional name, retaining the first one for partial use, this would be as effective a change so far as as it was used, as if the legal name were entirely discarded; and to that extent it would be a violation of the rule prohibiting a change of name.

If a corporation may legally adopt *one* name, why not two or three? The uncertainty and confusion which would result from such a course is even more objectionable than that arising from a change in name. It is submitted that no authority can be produced sustaining such a principle, while the authorities against it are numerous and to the point.

McGary v. *The People*, 45 N. Y., 153, and cases cited;
Queen v. *Registrar*, 10 Ad. & El. N. S. 839;
Sykes v. *The People*, 132 Ill. 32.

A perusal of the charge will show that it is erroneous in other respects of which lack of space prevents further discussion. The errors referred to herein are apparently sufficient to render a new trial necessary.

E

IMPROPER MODE OF REFRESHING RECOLLECTION.

The use of the testimony taken before the grand jury, as permitted by the court, during the examination of Mr. Dorr, was improper and prejudicial to the defendant.

This proposition is covered by Assignment No. 9 (Record, pp. 73–76). The effect of said assignment is shown by the following statement:

The witness, C. M. Dorr, testified that he was national bank examiner, and went to Exeter by order of the comptroller to take charge of the bank; that when he found that certain bonds were missing he went to Boston, but did not find Mr. Putnam there; that his mind had been occupied by other matters, so that the matter was not very clear to him; and that he could n't remember whether he had a little talk with Putnam about those bonds or not. Then in answer to a question whether Putnam had ever, at any time, told him what he had done with the bonds, the witness answered, "Not that I now recollect." (Record, p. 74.) The error complained of is the conduct of the prosecuting attorney, Mr. Branch, at this point, and the ruling of the court thereon, as is shown in the discussion following (and see Record, pp. 74–76).

***a.* The testimony of the witness taken before the grand jury was not a proper means of refreshing his recollection.**

The district attorney stated that he had the witness's testimony before the grand jury, and then, with permission of the court, he referred to this and apparently read for the purpose of putting the questions. It will be argued *infra* that this conduct was improper, in itself, even if the testimony produced was proper as a means of refreshing recollection; but it is clear that such testimony was improper for this purpose.

The memory of the witness could not be refreshed in this way. The minutes from which it was proposed to refresh his recollection were mere hearsay. They were not made by him, nor written down

by his authority. So far as appears, he had never seen them before the trial, or examined them to test their accuracy.

"Where the witness neither recollects the fact nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; a witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said." 1 Greenl. Evi., s. 436 (15th ed.).

And this particular error is very plainly shown in this case, for the answers of the witness in this part of his examination were but inferences from the minutes read by the counsel. And his testimony in this respect was simply hearsay.

For example, in answer to a question whether he did not testify before the grand jury that when he discovered the bonds were gone he went to Boston and learned that Mr. Putnam had them, and that Putnam acknowledged that he had the bonds on the third day of August, he says,—"*If it is a matter of record, I suppose that it is so.*"

Q. (by Mr. Branch). I am now asking if you did not so testify before the grand jury?

A. If it is a matter of record, I do n't dispute the record.

Q. Did you testify before the grand jury that you said to him something about the bonds, and he said, "Mr. Dorr, I will state to you I am not going to run away"?

A. Yes, I did.

Nowhere in his testimony did he say that, with the aid of this testimony, he could, at that time, remember the facts referred to in that testimony. Even if he had, it is submitted that the means of refreshing his recollection were legally unsuitable.

In *Morris* v. *Leachman*, 68 Col. 109, it was held that a witness cannot refresh his memory from an affidavit previously sworn to and subscribed by him *ex parte*, unless it be shown that the affidavit was written by him or under his direction at the time the facts occurred or immediately thereafter, or at some other time when the facts were fresh in his memory, and that he knew the same were correctly stated therein.

In *Acklen* v. *Hickman*, 60 Ala. 568, the law on this subject is laid down very plainly by Mr. Justice Stone as follows:

"The law recognizes the right of a witness to consult memoranda

in aid of his recollection under two conditions. First, when after examining a memorandum made by himself, or known or recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class, the witness testifies to what he asserts are facts within his own knowledge; and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that without such assistance his recollection of the transaction he testifies to had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence in the cause, and its contents are not made known to the jury. . . .

"In the second class are embraced cases in which the witness, after examining the memorandum, cannot testify to an existing knowledge of the fact independent of the memorandum. In other words, cases in which the memorandum fails to refresh and revive the recollection, and thus constitute its present knowledge. If the evidence of knowledge proceed no further than this, neither the memorandum nor the testimony of the witness can go before the jury. If, however, the witness go further, and testify that at or about the time the memorandum was made, he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum."

Under this exposition of the law, we say,—

(1) That the witness was not allowed to examine the minutes and state whether he remembered the facts independently of the minutes;

(2) That he did not know that the minutes were true; and

(3) That it necessarily follows that this method of "refreshing the memory" of the witness was illegal and unauthorized.

Under the guise of aiding the witness's recollection, direct, affirm-

ative, hearsay evidence was thus submitted to the jury on an important issue on trial; and its admission was manifest error.

See also *Guy* v. *Mead*, 22 N. Y. 462;
Marchy v. Shults, 29 N. Y. 346.

"In order to refresh the recollection of the witness, it is not important that this paper, book, or memorandum should have been written or printed by himself, or that it should be an original writing. It is sufficient that he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts, if thereby called to his recollection."

Rice Evidence 748;
Hazen v. *Wendell*, 11 N. H. 112;
Huckins v. *Ins. Co.*, 31 N. H. 238;
State v. *Shinborn*, 46 N. H. 497;
Kelsea v. *Fletcher*, 48 N. H., 283;
Watts v. *Sawyer*, 55 N. H. 38;
Bigelow v. *Hall*, 91 N. Y. 145;
Coffin v. *Vincent*, 12 Cush. 98;
Commonwealth v. *Ford*, 130 Mass. 64;
and cases there cited.

b. The conduct of the district attorney in producing the testimony taken before the grand jury, in reading from it, and in asking the witness if he did not so testify before the grand jury, was improper.

The witness had stated that he did not recollect that Putnam ever told him what he had done with the bonds. The district attorney, stating that he was surprised at the witness's answer, said in the presence of the jury: "I have his testimony before the grand jury, and I wish to ask him if he did not testify to certain things before the grand jury."

And then he was allowed, subject to exception duly taken, to read from his minutes of the testimony before the grand jury and to ask the witness if he did not so testify; to which the witness replied that "if this is a matter of record I suppose that it is so," and "I do not dispute the record."

This method of examination was allowed for the purpose of directing "the attention of the witness to something which may refresh his recollection."

But it is submitted that the inevitable effect of allowing counsel to read from a paper which he states contains the minutes of the witness's testimony on another occasion, is to allow and encourage the jury to believe that what it is claimed he then said—not what he now testifies to—is true. Saying to the counsel that it is allowed for the purpose of refreshing the witness's memory does not purge it of its unfair and improper influence on the minds of the jury. Under such a ruling the whole of the witness's testimony before the grand jury might have been read before the trial jury, and the prosecution would have had the unusual and extraordinary advantage of proving their case by *ex parte* hearsay evidence, given in the absence of the respondent and written down by a third party who is not subjected to the important test of cross-examination. While admitted ostensibly to assist the witness on the stand in testifying to the truth, its effect is to contradict and discredit his testimony and to show that he testified to the truth on some other occasion.

Unless counsel are allowed to state facts to the jury which the witness is unable to remember, this exception must be sustained.

But the counsel in this case was allowed to do even more than that. He practically said to the jury, "I have here the minutes of the witness's testimony before the grand jury, written down by a third party who is not present, which under the ruling of the court, although I am not under oath as a witness, I will now proceed to read to you." Plainly nothing could be a greater travesty on the administration of justice than such unprecedented procedure.

If this exception is to be determined by New Hampshire law as interpreted by the supreme court thereof, then the verdict must be set aside on the ground that the trial was an unfair one.

The following quotation is taken from the opinion of *Doe*, C. J., in *Baldwin* v. *Grand Trunk Railway Co.*, 64 N. H. 596, 597:

"Kilpatrick, a brakeman on the train that ran over Waldron, was not called as a witness by either party at the trial. On the cross-examination of Gonyea, the engineer of that train, the plaintiff's counsel, holding up a paper, asked,—'Do you know Kilpatrick's handwriting?' The witness replied that he did not. The plain-

tiff's counsel then said,—'He gave his statement, and has since been discharged by the Grand Trunk Railway Company, has n't he?' This was one way of informing the jury that the exhibited paper contained Kilpatrick's written statement; that it was adverse to the defendants; and that for this reason Kilpatrick had been discharged by them. The objection to this unsworn testimony was not avoided by the interrogative form of words. The substance was inadmissible. The effect of the testimony was intensified by the declaration that if the defendants objected to the so-called question, the plaintiff would waive it. This method of increasing the force of incompetent evidence is illustrated by the case supposed in *Bullard* v. *B. & M. Railroad*, 64 N. H. 27, 35, and nothing need be added to the decision of that case. A judicial trial means a fair trial. The court has no discretionary power to compel a party to submit to a trial that is not fair. 'Had the plaintiff's whole case been proved in the same way (by the unsworn testimony of his counsel), the error, although extended in fact over more ground, would not have been raised to a higher degree of illegality.' The wrong was not rectified, the error was not acknowledged, the testimony was not withdrawn, and the plaintiff did not obtain explicit instructions from the court to the jury to disregard it."

In that case the conduct of counsel in attempting to testify was much less reprehensible than in this case. He did not say that he held in his hand a statement by Kilpatrick; nor did he attempt to read from it. He merely exhibited a paper and asked if Kilpatrick had not made a statement and been discharged by the railroad. And the court held that this was improper conduct on the part of the counsel, and set the verdict aside, because the trial was for this reason "unfair and illegal." But if that trial was "unfair and illegal" on the ground suggested, then the unfairness and illegality of this trial are established beyond any sensible question or doubt.

Other New Hampshire cases in support of this position are:

Bullard v. *Railroad*, 64 N. H. 27;
Hilliard v. *Beattie*, 59 N. H. 462;
Cross v. *Grant*, 62 N. H. 675;
Tucker v. *Henniker*, 41 N. H. 317;
Noble v. *Portsmouth*, 30 Atl. 419;
Robertson v. *Madison*, 29 Atl. 777.

In *Billingslea* v. *State*, 85 Ala. 323, it was held that a witness cannot be questioned on the trial as to his testimony before the grand jury during their investigation of the charge against the defendant.

In that case, counsel for the state having proved that a certain

written statement which he had, contained the witness's testimony before the grand jury, the court allowed the witness to refer to the statement for the purpose of refreshing his recollection. But it was held to be error for the solicitor, while looking at the statement, to ask the witness if he did not "testify before the grand jury to the effect," as therein stated.

If the solicitor, instead of proving the character of the written statement and showing that it contained the testimony of the witness before the grand jury, had asserted that it was such a statement and had then proceeded to read from it and to ask the witness if he did not so testify, the case would have been exactly parallel with this case. The only difference between them in principle is that here the prosecution committed two fatal blunders, while in that case there was but one.

But it may be said that in some of the cases we have cited, and in others which we shall refer to presently, the error was committed by counsel in argument, and not in the course of the examination of witnesses. But if it is not allowable for counsel in argument to state prejudicial facts of the existence of which there is no evidence, why is not the error as great and the mischief as certain when he states the same facts in positive and unequivocal language in the presence of the jury at any stage of the trial? If Mr. Branch in this case had delayed producing his minutes of the testimony before the grand jury until he began his argument, and had then said in substance,—"I have here the testimony of this witness as given before the grand jury where he testified as follows,"—is there any doubt that such a proceeding, if objected to, would receive the severe condemnation of the court, and result in a new trial? But that is substantially what did occur in the presence of the jury; and the circumstance that it took place during the examination of a witness does not remedy in the least its illegal and unfair effect upon the minds of the jury.

In addition to cases already cited we refer to the following:

Waldron v. *Waldron*, 156 U. S. 361;
Radley v. *Seider*, (Mich.) 58 N. Western 366;
Schillinger v. *Verona*, 88 Wis. 317;
Turner v. *Foundry Co.*, 97 Mich. 166;
Scrippe v. *Reilly*, 38 Mich. 10.

We submit, therefore, that it was error for the district attorney,—

(1.) To inform the jury that he had the minutes of the witness's testimony before the grand jury.

(2.) To read selections from these minutes.

(3.) To omit to hand the minutes to the witness for the purpose of refreshing his recollection.

(4.) To ask the witness to refresh his memory from the minutes which the witness did not make or authorize to be made, and which he did not know to be true.

If such a method of examination were allowed, an unscrupulous attorney might grossly mislead an honest witness by pretending to refresh his memory by reading from some memoranda prepared for the occasion and wholly unconnected with any statement the witness ever made. Simply asking a witness if he had ever testified to a certain fact, for the purpose of reviving his memory, may be permissible, but to state that a certain document is the statement of the witness on another occasion, and to proceed to read from minutes the witness never saw before and does not know to be true, ostensibly for the purpose of refreshing his memory, is a practice, which, if upheld, would inevitably lead to the grossest and most glaring abuses. Under it counsel could insinuate into the trial all sorts of incompetent testimony, and often put into the mouths of witnesses just such statements as the necessity or convenience of the case might require.

And for this reason it was held in *Bushford* v. *People*, 24 Mich. 244, that it is error to permit the prosecution on a criminal trial, against the objection of the prisoner, under pretence of refreshing the recollection of a witness, to read to him while on the stand, and in the presence of the jury, his evidence given on a previous occasion, and then to ask him whether, after having heard it read, he recollected certain facts stated in it. Judge Cooley, in the opinion, says:

"If the practice were admissible, the rule against leading questions would not be of the least importance; for in this way it would be easy to put into the mouth of the witness the very words it was desired he should repeat; and where he had been sworn before, all possible discrepancies would be avoided."

F.

CROSS-EXAMINATION OF BYINGTON.

The court erred in refusing to allow the defendant to ask C. E. Byington, on cross-examination, what percentage of the capital stock of the bank was owned by the defendant during the first six months of 1893, the period during which the unlawful acts were alleged to have been committed.

This proposition is covered by Assignment No. 10 (Record, p. 76), the effect of which is shown by the following statement:

C. E. Byington, witness for the prosecution, on direct examination, testified that Warren F. Putnam was president and director of the National Granite State bank from January 1, 1893, until its suspension, and acted as clerk; that he was president of the Leavenworth Electric Railway and of the Lexington Hydraulic Company; that when the directors of the bank learned of certain checks, which they claimed Putnam had drawn without authority, they took as part payment to make up the amount which was withdrawn by said checks, twenty-five thousand dollars worth of bonds of said Leavenworth Electric Railway and ten thousand dollars worth of the bonds of the Lexington Hydraulic Company. He also testified on direct examination that the Leavenworth and Lexington Companies were Mr. Putnam's paramount interest. On cross-examination by defendant's counsel, the witness stated that Mr. Putnam held large amounts of the Leavenworth and Lexington stock on his own account, was buying and selling and had on hand more or less of said securities. Counsel for the defendant then asked:

Q. "What percentage of the stock of the National Granite State Bank of Exeter did Mr. Putnam own during the first six months of 1893?"

The prosecution objected to this question, which was ruled out, solely on the ground that cross-examination should be limited to the subject-matter of the direct examination (Record, pp. 76–78).

a. **The evidence offered was material and competent, as bearing upon the question of intent.**

It has been invariably held that intent is a material element in cases arising under section 5209 and similar statutes. This point is so well settled as to need no citation of authority. In addition

to establishing that the defendant actually took the bonds referred to in the first two counts, and actually drew the checks referred to by the seventh count and specification thereon (Record, p. 18), it would have been incumbent upon the government to show that these acts were done "with intent to injure and defraud the association," in the words of the statute and of the indictment. Any evidence fairly tending to prove such intent could be introduced by the government, and any evidence to disprove it could be introduced by the defendant.

See *United States* v. *Voorhees*, 9 Fed. R. 143;
United States v. *Fish*, 24 Fed. R. 585;
United States v. *Northway*, 120 U. S. 327;
Potter v. *United States*, 155 U. S. 438.

It is obvious that this evidence has an important bearing on the question of intent. The first six months was the period during which the alleged unlawful acts were committed. (Record, pp. 2, 7.) If Mr. Putnam was owner of three fourths of the stock of the bank, as the defendant offered to show (Record, p. 77), then he would be less likely to be guilty of an offense "with intent to defraud the bank" than if he owned a small number of shares. As owner of three fourths of the stock, he would himself have to bear three fourths of any loss, and would receive three fourths of any gain, which his acts might cause the bank. In one case his use of the bank's funds for the purpose of protecting securities which the bank held might be perfectly lawful, or even highly meritorious, although such conduct were inhibited by the statute; but if he were but a small owner, the same conduct would be open to just suspicion and warrant grave doubts as to his good faith. In one case he would be dealing with funds of which he was indirectly three-fourths owner; in the other, with funds in which his interest was too small to be considered. This proposition is so obvious that further discussion is unnecessary.

It being established that the evidence offered was material, the question is, whether the judge's ruling on the question of cross-examination was correct.

The rule in the United States court is that cross-examination should be limited to facts and circumstances connected with the matters stated in the direct examination.

Philadelphia, etc., R. R. Co. v. *Stimpson*, 14 Peters 448, 461;
Houghton v. *Jones*, 1 Wall. 702;
Wills v. *Russell*, 10 Otto 621.

Under this rule, the test of the propriety of a question on cross-examination is, does the question relate to a subject matter which was touched upon in the witness's direct examination? It therefore becomes necessary to examine the direct testimony on this point.

b. The question of intent was introduced by the government in the direct examination of the witness.

The testimony in regard to Putnam's relations to the Lexington and Leavenworth Companies, and especially that they were his paramount interests, was material only upon the question of intent. From these facts the prosecution might argue (and if the argument had been printed it would probably appear that he *did* argue) that Mr. Putnam was sacrificing the bank to his "paramount interest" in the other two companies. Under such an argument, acts which would otherwise appear entirely innocent might be made to seem actuated by fraudulent intent. For example, if the defendant drew certain checks and used the proceeds for the benefit of those companies, his relations to them would be an important element in determining his intent. If his relations were close, as the witness testified, while he had little interest in the bank, it would be a fair inference that the intent was fraudulent; and *vice versa.*

The question having been opened up on direct examination, the cross-examination was not only proper, but necessary, in order to determine how much weight the evidence had.

c. The cross-examination was proper as a test of the correctness of the witness's statement that Lexington and Leavenworth were Mr. Putnam's paramount interest.

This general statement elicited from the witness in direct examination, was certainly of a nature to require explanation; and it was of the utmost importance to the defendant to establish that it was incorrect, or founded upon a wrong inference. Cross-examination was the proper method of weakening the effect of this damaging testimony, and this method was attempted by defendant's counsel, but was prevented by the ruling.

The statement by the witness involved a consideration of many elements. What was defendant's interest in Leavenworth and Lexington, and what in the bank; what did witness mean by "paramount interest"; on what particular information did he found his statement? These, and many other questions, would suggest themselves to any cross-examiner. It is submitted that it was most

unfair to allow a general statement, so damaging to defendant, to go to the jury without granting to defendant the exercise of the right of cross-examination.

In *United States* v. *Flourry*, 1 Sprague 109 (U. S. Cir. Ct. Dist. Mass. 1845), a witness for defendant, on direct examination, testified that a certain person was a man of large property. The prosecuting officer was allowed to ask on cross-examination of what the property consisted. In supporting this ruling, the appellate court say:

"The question put by the district attorney was proper, in order to test the correctness of the original statement made by the witness, and is clearly within the established principles and practice of cross-examination."

It is submitted that the question was proper on either of the above grounds, and that its exclusion was error.

G.

JURISDICTION.

1. The court erred in denying defendant's motion to direct a verdict for the defendant upon the seventh count.

2. The court erred in charging the jury upon the question of jurisdiction over the offenses alleged in the seventh count, as indicated by the evidence, and as to the effect of said evidence.

These two propositions are covered by Assignments Nos. 12 and 17 respectively, but as the principles involved in each are substantially the same, they will be considered together. The assignments allege error as follows:

Assignment No. 12 assigns as error the denial of defendant's motion to direct a verdict for the defendant upon the seventh count. (Record, p. 78.) The effect of said assignment will be fully considered below.

Assignment No. 17 covers that portion of the charge relating to the place where the abstraction alleged in the seventh count was committed, as bearing upon the question of jurisdiction, and to the effect of the evidence pertaining thereto. (Record, p. 85.)

That portion of the charge included in this assignment is given in full in the Specification of Errors, *ante*, pp. 37–41. Its effect will be considered herein, *infra*.

The facts essential to an understanding of this branch of the case may be summarized as follows:

The seventh count charges that the defendant, as "president of a certain banking association," etc., "on, to wit, the first day of January," 1893, "and at various times between that date and the fifteenth of July," 1893, "at Exeter, in said district, and within the jurisdiction of this court, . . . did then and there unlawfully and wilfully and without the knowledge and consent of said association, and with intent to injure and defraud said association, abstract, and convert to his own use the monies, funds and credits of the property of said association, to wit, forty thousand dollars of the monies, funds and credits of said association, a more particular description of which monies, funds and credits is to the said jurors unknown." etc. (Record, p. 7.)

On December 11, 1894, the district attorney sent to the defendant's counsel a letter stating that he proposed to try the defendant on certain counts, including the seventh; that none except the seventh required a specification; and he gave the items as to that count, said items, so far as material, being as follows:

"January 17, 1893 . . . . . $5,000.
" 23, " . . . . . 5,000."

and eight other similar items of later date. "All of which sums were drawn by checks to the order of the American Loan and Trust Company of Boston, on the National Bank of Redemption."

"Also:

April 7, 1893 . . . . . $50."

and four other similar items of later date.

"All checks to the order of H. N. Smith on the National Bank of Redemption."

When this letter, which was not filed with the clerk, was called to the attention of the court, he said that while it was not, strictly speaking, a bill of particulars, it should be treated as notice to the defendant of the transactions to be put in issue, and that the evidence should be limited to such transactions or matters reasonably connected therewith. (Record, pp. 18, 19.)

The evidence adduced by the Government in support of the seventh count tended to prove the following facts:

"The bank at Exeter kept an account with the National Bank of Redemption, in Boston, Massachusetts, which was designated by the term 'reserve agent.' From time to time deposits were made and checks were drawn by the bank at Exeter on this account.

"Upon the 1st and 16th of each month statements called reconciliation sheets, showing deposits and checks on this account, were sent by the reserve agent to the bank at Exeter. The cashier of

the latter compared the items on the reconciliation sheets with the account on his books, and if the two coincided he so notified the cashier of the reserve agent, and the account was considered settled to that time. If the accounts did not agree, the discrepancies were noted and finally adjusted by correspondence between the two cashiers.

"Evidence was admitted, subject to defendant's exception, tending to show that at a meeting of the directors of the bank at Exeter, held about one year prior to the alleged unlawful drawing of checks by the defendant at Boston, a vote had been passed by the board of directors that no one but the cashier should thereafter have authority to draw checks against the account with the reserve agent; that the defendant was present at that meeting and acted as clerk of the board.

"Such a vote was never recorded in the directors' records and the reserve agent was never notified of it.

"The checks mentioned in Mr. Branch's letter to Mr. Streeter dated Dec. 11, 1894, to the seventh count were all drawn in Boston between Jan. 16 and May 6, 1893, both inclusive. They were delivered to the payees thereof in Boston in return for cash or funds in the form of checks or drafts. The checks drawn by the defendant were put into process of collection through various national banks in Boston, and, having duly passed through the Boston clearing-house, were paid by the National Bank of Redemption at Boston out of funds in its hands belonging to the bank at Exeter, and proper entries were made upon the books of the reserve agent debiting the bank at Exeter and crediting itself with the amount so paid.

"Two of the checks mentioned in the bill of particulars, viz., the check dated Jan. 17, 1893, for five thousand dollars, payable to the order of the American Loan and Trust Company of Boston, signed by Warren F. Putnam, president, and that of Jan. 23, 1893, of the same amount and tenor, were produced and put in evidence by the prosecution. The evidence tended to show that the defendant delivered said checks to the payee, the American Loan and Trust Company, on the dates thereof and received in exchange for the same drafts for the same amount, drawn by the American Loan and Trust Company on Winslow, Lanier & Co., of New York. These drafts were paid by Winslow, Lanier & Co. at New York on Jan. 18 and 24, 1893, respectively, and the endorsement thereon showed that they had been used by the respondent for some purpose, the nature of which was not indicated by the evidence, except as appears from this bill of exceptions. The checks of Jan. 17 and 23, 1893, were duly presented to the reserve agent through the clearing-house, paid, and charged off as above described.

"That all of the foregoing-named checks, except the first two checks, dated Jan. 17 and 23, 1893, respectively, were drawn between the first day of April, 1893, and the 6th day of May, 1893. Neither the cashier nor the directors of the bank knew that the April and May checks had been drawn until about the 1st of May, when the reconciliation sheet with the accompanying checks were

received from the National Bank of Redemption; that Putnam declined to make any explanation as to why the checks had been drawn or what he had done with the money, and the evidence tended to show that he evaded making any explanation until about the 24th of May; that then he stated to the directors that the money had been used to put into the Leavenworth Electric Railway Company and the Lexington Hydraulic Company; that at this time the amount of money which he had withdrawn from the funds of the bank amounted to about $36,000, to wit, $10,000 on January 17 and 23 and $26,000 in April and May.

"CHARLES E. BYINGTON, witness for the prosecution, testified as follows:

Q. How often did they send those reconciliation sheets?
A. Twice a month.
Q. At what time?
A. The middle and the first of the succeeding month.
Q. Did you get any checks or vouchers at the middle of the month?
A. Probably I did, the first of February.
Q. That would not be the middle of the month?
A. It would not.
Q. When did you get your vouchers back?
A. The first of the month.
Q. Did you get your reconciliation sheets twice a month?
A. Twice a month.
Q. When that reconciliation sheet came in on the first of February, 1893, do you remember about those two checks of five thousand dollars, one on the 17th and the other on the 23rd of January, drawn to the order of the American Loan and Trust Company?
A. I think I do, sir.
Q. Look at those first two checks (handing witness a package of checks) and say whether or not you ever saw them before.
A. I have seen them.
Q. Where?
A. I have seen them in the National Granite State bank, at Exeter.
Q. Can you tell when or about when?
A. It was some time the first of February, 1893.
Q. Did you have any conversation with Mr. Putnam about those two drafts?
A. Yes, sir.
Q. What was it?
A. Well, we were—we had given our note for ten thousand dollars to this American Loan and Trust Company some time previously to this. I asked Mr. Putnam what those were for, and he said they were to pay that loan. I asked him if I should enter it on the books as paid, and he said yes.
Q. Did you do so?
A. I did so.

Q. And credited that amount to the National Bank of the Redemption?

A. Yes, sir.

Q. Did you know those checks had been drawn till they came back with your vouchers on the first day of February?

A. No, sir; I think not.

"From all this evidence the Government contended that this conversation took place in Exeter about February 1st, 1893, when the reconciliation sheet for January came back from the National Bank of Redemption with the vouchers for that month, among which were the two checks for $5,000 each drawn January 17 and 23, respectively, and that the entry which was made by Byington, the cashier, charging off the note of $10,000 and crediting the National Bank of Redemption with the amount and allowing it on the account current was made immediately after this conversation and in accordance with Putnam's instructions so to do to the cashier.

"Some time in May following Byington discovered that the note had not been paid, and upon interrogating Putnam about it, he, Putnam, stated that when he said it was paid 'he lied about it.'

"The Government offered no evidence, except as appears from this bill of exceptions, of any acts committed by the defendant within the district of New Hampshire connected in any way with the alleged unlawful abstraction."

At the close of the Government's case, the motion referred to in Assignment No. 12, was filed (Record, p. 78). The grounds stated in the motion all involved the same theory, viz., that the evidence showed that the several offenses of abstraction, as alleged in the seventh count and "bill of particulars" (the letter of Dec. 11, 1894) were finally completed upon the payment of the checks at the National Bank of Redemption, at Boston, and that there was no evidence that any essential part of the offense charged was committed within the district of New Hampshire. (Record, pp. 78, 79.)

This motion having, after hearing thereon, been denied, the defendant duly excepted upon the grounds

1. That the evidence showed that the abstraction, if committed at all, was completed in Boston, Massachusetts, outside the jurisdiction of this court.
2. That the evidence of criminal acts committed within this jurisdiction is not sufficient to establish the jurisdiction of this court over this cause.
3. That the evidence shows that the abstraction, if committed at all, was completed, so far as the defendant was concerned, when the checks by means of which the abstraction was alleged to have been accomplished were paid by the National Bank of Redemption.
4. That the act alleged to have been committed by the defendant

within this district did not constitute an offense of the character charged in the seventh count and the bill of particulars annexed thereto.

5. That there was a substantial variance between the locality alleged in this count and that indicated by the proof.

(Record, pp. 78, 82.)

Upon the points involved in these assignments, the theory adopted by the court, in denying the motion and charging the jury, was, that although the checks were drawn in Boston, and the money obtained upon them there, the transaction was not entirely completed when this was done, but when the bank at Exeter "surrendered its credits" in the Boston bank, by admitting that the payment on its account upon those checks was a legal debit against it; that the vote of the directors, passed about a year before, was evidence upon the question whether the defendant had authority to draw such checks, and that if he had such authority, the offense would be complete in Massachusetts; while if he had not such authority, the Exeter bank could have refused to allow the debits, and thereby have prevented the abstraction of its "credits" in the Boston bank; that these "credits" of the Exeter bank were not affected by these checks, if they were drawn without authority, until the charges against its balance on that account were approved and allowed; that if the jury found that he induced the directors, by artifice, *at Exeter*, to surrender the "credits," that is, to allow these debits against the Exeter bank, arising from these checks, then he would be guilty in the jurisdiction of abstracting said "credits;" but that the deception alleged to have been practised upon the officials of the Exeter bank, at Exeter, must have been a part of the original plan: that all these facts, if established, would constitute an offense begun in one jurisdiction and completed in another, which might be tried in either.

a. The motion to direct a verdict was proper, and should have been granted upon the evidence in the case.

It seems to be a universal rule of practice for the court to order an acquittal, if the evidence fails to establish the crime charged. In such a case, the test is whether or not such evidence has been adduced by the prosecution as would fairly justify a verdict of guilty.

Bishop. Crim. Proc., Sect. 977 and cases cited.
Rapalje, Crim. Proc., Sect. 376.

Obviously, this principle is applicable to every essential element of the offense, and especially to the question of jurisdiction. The jurisdiction of the district court, where this indictment was found, extends to "crimes and offenses cognizable under the authority of the United States, committed within their respective districts." (U. S. Rev. Stats., Sec. 563.) It is, however, further provided that " when any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein." (U. S. Rev. St., Sec. 731.)

Under these rules, the question here is, " Was there such evidence as would fairly justify a finding that the defendant committed any essential part of the offence alleged, within the jurisdiction of the court below? "

It is apparent that the exception to that part of the charge, relating to the effect of the evidence pertaining to the question of jurisdiction, covers precisely the same point.

b. The evidence of criminal acts committed within the district of New Hampshire was not sufficient to establish jurisdiction : in other words, there was not sufficient evidence to justify a finding by the jury that the defendant committed any essential part of the alleged offenses within the jurisdiction.

It is obvious that the court considered that the main transaction was completed in Boston, but he stated in effect that there was sufficient evidence to justify a finding that the defendant did something in New Hampshire to induce the officials of the Exeter bank to "surrender its credits" in the Boston bank.

The only evidence which can by any possibility relate to such acts is,

1. That after the officials of the bank learned (on or about May 1, 1893) of the checks which were drawn by the defendant between April 1 and May 6, 1893, the defendant declined to make any explanation as to why the checks had been drawn, or what he had done with the money, until about May 24, 1893, when he told the directors that the money had been used to put into the Lexington and Leavenworth companies. (Record, p. 80); and

2. The testimony of Byington to the effect that when the reconciliation sheet of February 1, 1893, came, he remembered about two checks of January 17 and January 23 respectively, drawn to the order of the American Loan and Trust Company; that he had seen the two checks exhibited to him by Mr. Branch during the examination in the National Granite State Bank at Exeter about Feb. 1, 1893. He testified as follows:

Q. Did you have any conversation with Mr. Putnam about those two drafts?
A. Yes, sir.
Q. What was it?
A. Well, we were—we had given our note for ten thousand dollars to this American Loan and Trust Company some time previously to this. I asked Mr. Putnam what those were for, and he said they were to pay that loan. I asked him if I should enter it on the books as paid, and he said yes.
Q. Did you do so?
A. I did so.
Q. And credited that amount to the National Bank of the Redemption?
A. Yes, sir.
Q. Did you know those checks had been drawn till they came back with your vouchers on the first day of February?
A. No, sir; I think not.

This is all the evidence tending to show acts committed by the defendant within the district of New Hampshire connected in any way with the alleged unlawful abstraction. (Record, p. 81.)

It is submitted that the evidence has no tendency whatever to show that the defendant did anything within the district of New Hampshire to induce the officials of the Exeter bank to "surrender its credits," upon the checks drawn in Boston; and that is the only effect which the government claimed for the evidence.

The evidence that the defendant refused to explain what he had used the money for has no tendency whatever to show any artifice to induce the officials of the bank to "surrender its credits." They knew that he had drawn the checks; if he had no authority to draw them, they were not binding upon the bank; and it does not appear that the directors recognized them as binding until after they knew all about the transaction. The very fact that he evaded explanation was certainly sufficient to put them on their guard, rather than to disarm suspicion, or increase the effect of any misrepresentation. Evasion would not amount to artifice: and it is inconceivable that any sensible man could be induced by such conduct to give up any substantial rights. There is absolutely no ground for an argument

that this evidence had any tendency to show artifice or misrepresentation in New Hampshire, finally consummating an abstraction commenced in Massachusetts.

The testimony of Byington is equally unimportant. The burden of proving an offense within the district was upon the prosecution. This evidence was, in effect, that witness had a conversation with Mr. Putnam about two checks, in which the latter said they were used for paying a loan, and that witness might mark the loan as paid; that witness did as directed, and credited the amount to the Boston bank; and that he did not know the checks had been drawn till they came back with the vouchers on February 1st. There is absolutely nothing in this evidence to show (1) that the conversation took place within the district of New Hampshire, (2) at what time it took place, or (3) that the circumstances testified to had any relation whatever to the action of the bank officials in allowing the debits against the bank on account of those two checks. The statement, if correct, that Putnam afterwards acknowledged that he misstated the facts, does not in the least strengthen the testimony in those three particulars. It is true that the government contended that this conversation took place in Exeter about February 1st, when the two checks of January 17th, and 23d, came back; but that contention adds nothing to the testimony. If the facts were as claimed, the government might easily have asked the witness such questions as would have elicited testimony to sustain them. This they did not do. There is absolutely no affirmative evidence of these facts, to satisfy the burden of proof. The testimony in question has not the least tendency to prove any criminal acts within New Hampshire.

On the other hand, the omission to produce this evidence, so clearly within the power of government to produce, if it existed at all, is strong evidence that the conversation did *not* occur within the jurisdiction, or at a time when it would have any bearing upon the offenses alleged.

But even admitting that the conversation was at Exeter, it is difficult to see what it has to do with the commission of the offenses alleged. It is merely a false statement in regard to a past transaction; and as we shall endeavor to show, it had no effect whatever upon the rights and liabilities of any of the parties in interest.

A broad view of all this evidence, apart from questions of technical law, leads inevitably to the conclusion that the defendant's offense, if any, was completed in Massachusetts. Admitting all that is claimed by the Government, there is not enough evidence to justify an adverse finding by the jury. The defendant drew the checks in

Boston, used them in Boston to raise money on, and they were paid in Boston. He had what he wanted, the money, and he applied it as he pleased, all in Boston. Having done all this, is it reasonably probable that he went up to Exeter and misrepresented the facts to the officials there, for the purpose of "inducing" them to "surrender the bank's credits" at the Boston bank; and is it not inconceivable that he should have devised the elaborate scheme at the outset, which the law would require, if the position of the court below is sound? If he made any misrepresentations in Exeter, they were undoubtedly to prevent the discovery of the alleged withdrawal, which had been completed, and not to consummate a preconceived arrangement to induce his directors to take some action which would result in depriving the Exeter bank of any rights it might have against the Boston bank. In this view of the case, the conclusion is irresistible that the refusal of the court to direct a verdict for the defendant was error, and that the charge upon these facts was improper and prejudical. If any offense was committed in Massachusetts, let the case be tried in that forum and not in the district of New Hampshire.

This being a jurisdictional question, it ought to have received careful consideration from the court below; and while every fair inference is required by law to be drawn against the defendant upon such a motion, the case is, after all, to be considered in the light of common experience.

c. The seventh count and the letter of Dec. 11, 1894, specifying the offenses covered by said count, do not relate to "credits" as defined by the court.

The seventh count charges the abstraction of "monies, funds, and credits . . . to wit, forty thousand dollars of the monies, funds, and credits of said association." The letter of Dec. 11, 1894, which the court declared to be "notice to the defendant of the transactions to be put in issue," indicates that the charge is based on the abstraction of $5,000 in money on Jan. 17, 1895; $5,000 on Jan. 23, etc.: "*all of which sums* were drawn," etc. It is submitted that under this count the defendant cannot be convicted, upon evidence tending to show that he induced the directors to allow debits against the bank, even if there had been such evidence.

The count is clearly intended to charge the abstraction of money. The words "forty thousand dollars" can refer to nothing else. Words are to be construed according to their ordinary meaning; and surely the ordinary use of these words is to describe, not credits, not

the amount which one bank owes another, but the actual, tangible representative of wealth. If it had been intended to describe "credits" as defined by the court, surely different words than these would have been used. The purpose of an indictment is to give the accused a clear idea of the offence charged. If this count may be construed to mean "the right which the Exeter bank had to recover from the Boston bank" a certain sum; or "the amount due from the Boston bank to the Exeter bank"; or any other fair legal definition of a deposit in a national bank, it is submitted that the real purpose of the indictment is entirely disregarded. Such a construction is unnatural and could hardly be anticipated by the most astute practitioner.

The letter of December 11, 1894, adds still more to the force of this argument. It was specific notice of what was stated generally in the indictment. It contained no indication that the charge was founded on the abstraction of anything but money. Figures and words are given which are invariably used as descriptive of money; while neither the word "credits" nor any substitute thereof appears in the letter.

That an indictment for abstracting "money" cannot be sustained by evidence tending to show the abstraction of "credits" is too obvious to require argument.

d. Misrepresentations inducing the bank officials to allow the charges against its account, resulting from the checks drawn in Boston, are not an essential part of the offenses alleged. The action of the officials under the circumstances of this case would have no effect whatever on the rights and liabilities of the parties concerned.

This proposition must be considered under two different conditions.

(1.) If the defendant had authority, express or implied, to draw the checks in question;

(2.) If he had not such authority.

(1.) The court charged that if the defendant had authority to draw these checks, the transaction was completed in Massachusetts, outside the jurisdiction. This is undoubtedly correct, as far as it goes. If he had such authority, the Exeter bank would have no rights whatever against the Boston bank, and the subsequent conduct of the defendant could not put the bank into a worse position,

nor aid him in the execution of any alleged scheme for defrauding the bank. In that case the "credit," which the Exeter bank had in Boston, was extinguished as soon as the money was paid on the checks; and no further acts, either of Putnam, the directors, or the Boston bank, would make any change whatever in the legal relations of the two banks.

(2.) Unless the defendant had authority, express or implied, to draw these checks, sufficient to bind the Exeter bank, he committed no offence against that bank.

The evidence tended to show that the defendant drew certain checks on the Boston bank, in the name of the Exeter bank. It is clear that if he had no authority, either express or implied, these checks would not bind the Exeter bank at all. The Boston bank would in the first instance charge the checks against the Exeter bank, and their balance would be reduced by so much; then when the reconciliation sheets were forwarded to Exeter, the Exeter bank would repudiate the checks, and, if the Boston bank refused to restore their balance, there would be an adequate remedy at law, and the loss would finally fall upon the Boston bank. The offense would be, not abstraction from the Exeter bank, but obtaining money by false pretences of authority, from the Boston bank. In other words, it was legally impossible for the defendant to abstract forty thousand dollars of the "moneys, funds, and credits" of the Exeter bank, by means of checks purporting to be drawn on account of said bank, unless he had authority, express or implied, to draw said checks, and power to bind the bank thereby.

e. The evidence shows conclusively that he had authority to draw checks which would be binding upon the Exeter bank.

Evidence was adduced by the government in support of the seventh count tending to show that at a meeting of the directors of the bank at Exeter, held about one year prior to the time the checks in question were drawn, a vote had been passed that no one but the cashier should thereafter have authority to draw checks against the account with the reserve agent. This vote was never recorded, and *the reserve agent was never notified of it.*

This evidence may be material as bearing upon the question of defendant's good faith; but it goes further than that. It shows that the Boston bank was never notified of any limitation on his power to draw checks. Until such notice was given, that bank would have

a right to rely upon his authority, and the Exeter bank would be legally bound by such checks. This is a plain case of an uncommunicated limitation upon an agent's powers, which affects the relation between the principal and the agent, but does not affect the right of third parties to rely upon the apparent authority of the agent.

The fact that the Boston bank did accept these checks and pay out the money on them, to the amount of nearly forty thousand dollars, and that the Exeter bank allowed those payments, is conclusive evidence of the defendant's authority. If he had such authority, the charge itself is explicit in stating that the offense was completed in Massachusetts. The correctness of this principle is considered at "*d*" (1) *ante* p. 97.

f. There was no binding ratification.

It may be suggested that the drawing of these checks was originally unauthorized, and became binding upon the Exeter bank by ratification by the directors, induced by the artifice alleged to be proved by the evidence adduced. This idea is not directly stated by the court, nor was it suggested by the prosecution at the trial, but it may be urged in argument in support of the judgment.

Even if the drawing of these checks was not authorized, either expressly or impliedly, which is clearly contrary to the fact, this argument is of no weight. It presupposes a ratification induced by alleged *misrepresentations* of the defendant, as to the purpose for which the money was used.

If these moneys were used for the benefit of the bank, it might well ratify; if not, very many considerations would inevitably influence the question of ratification. In other words, the purpose for which the money was used would be a very material fact; and no principle of agency is better settled than that *ratificatiou under a mistake as to material facts does not bind the principal.* A ratification under any circumstances which would support the jurisdiction of the court below, would not be binding upon the bank, and could not affect its rights as against the Boston bank. If the statements made by the defendant were false, or if his conduct caused any misapprehension on the part of the directors, as contended by the government, their ratification (if the facts are consistent with the idea of ratification) was made under a mistake of facts, and was void and of no effect.

FRANK S. STREETER,
Counsel for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

WARREN F. PUTNAM, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 573.

SAME
v.
SAME. } No. 574.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

WARREN F. PUTNAM, PLAINTIFF IN error, *v.* THE UNITED STATES.	No. 573.
SAME *v.* SAME.	No. 574.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

BRIEF FOR THE UNITED STATES.

In the first case, No. 573, the plaintiff in error was indicted in the district court of the United States for the district of New Hampshire for the violation of certain provisions of the national banking laws. The indictment contained ten counts; of these, the accused was found guilty on the second and seventh counts only.

The *second count* charged that—

> he, the said Warren F. Putnam, being then and there the president of a certain national banking association, then and there known and designated as "The National Granite State Bank," which said association had been theretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking association at said Exeter, under the laws aforesaid, did then and there unlawfully and willfully, and without the knowledge and consent of said association, and with intent to injure and defraud said association, abstract and convert to his own use certain funds and credits of the property of said association, etc., to wit.

The seventh count is substantially the same as the second count, except as to the charge, which is—

> * * * abstract and convert to his own use the moneys, funds, and credits of the property of the association, to wit, etc. * * *

These counts were each demurred to, and the demurrer was overruled.

Certain exceptions were taken on behalf of the plaintiff in error during the course of the trial to the rulings of the court and the admission of evidence, and to certain portions of the charge given to the jury. These are set forth in the bill of exceptions (pp. 17–59) and in the assignment of error (pp. 60–88).

ARGUMENT.

I.

The first six assignments of error (pp. 60–72), and the thirteenth, fourteenth, fifteenth, and sixteenth, relate to the same subject-matter and will be considered together.

The charge in the second count, as in all the other counts of the indictment, was that he,

> the said Warren F. Putnam, being then and there the president of a certain national banking association, *then and there known and designated* as "The National Granite State Bank," which said association had been theretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking business at said Exeter, under the laws aforesaid.

The Government, to maintain the issue on its part, offered in evidence the duly authenticated copies of records in the Treasury Department of the United States, including the certificate of the Comptroller of the Currency, authorizing "The National Granite State Bank of Exeter, N. H.," to commence the business of banking. And his further certificate showing that "The National Granite State Bank of Exeter," in the town of Exeter, in the county of Rockingham and State of New Hampshire, had been duly organized, etc., and other official records of the Treasury Department, in each of which the association is designated as "The National Granite State Bank of Exeter."

To the introduction of each and all of said records, objection was made on behalf of the defendant that the

evidence offered did not show the existence of a bank authorized to do business under the name of the "National Granite State Bank," as charged in the indictment (pp. 19–23). But the court admitted the evidence over the defendant's objection. The Government then offered in evidence the records of the meetings of the stockholders and of the directors of the bank, and of the blank forms and stationery used by the bank, deposit slips, envelopes, postal cards, letter heads, pass books, receipts, checks, notes, mortgages, in each and all of which was the bank described as "National Granite State Bank."

The Government also offered evidence to show that the bank of which Putnam was president, and which did business at Exeter, N. H., issued bills which it obtained from the Treasury Department at Washington; that it made reports to the Treasury Department; was examined by national-bank examiners; had bonds deposited with the Treasury Department at Washington (p. 27).

The Government also proved that there was no other national bank located in Exeter, except the National Granite State Bank; that at the time the indictment was found Putnam, the defendant, was connected with no other bank there or elsewhere; that the National Granite State Bank was the only national bank doing business in Exeter, and that such business was done under authority derived from the Comptroller of the Currency.

The Government also introduced in evidence fifteen checks, drawn in January and April, 1893, in Boston, on the National Bank of Redemption, at Boston, each of which checks was signed "The National Granite State

Bank, Exeter, N. H., by W. F. Putnam, president," and were paid through the Boston clearing house.

All of this evidence was introduced to prove that the National Granite State Bank of Exeter did call itself on all of its papers through and by means of which it transacted its business with its customers and with the Treasury Department at Washington, by the name of "National Granite State Bank," omitting the words "of Exeter," and to prove also that no one could possibly have been misled to his injury by the alleged variance, because there was no other national bank in Exeter, and because Putnam, the plaintiff in error here, was president of the bank known as the National Granite State Bank, and was connected with no other bank there or elsewhere.

The thirteenth, fourteenth, sixteenth, and seventeenth assignments of error refer to so much of the charge of the court to the jury as bears upon the effect of this alleged variance.

So the single question presented in the first six assignments of error and the thirteenth, fourteenth, sixteenth, and seventeenth is, whether the variance in the name of the bank as set forth in the indictment, and as appears in the evidence, is so essential and material as to be fatal.

The general rule is correctly stated in Clark's Criminal Procedure, page 233:

> In naming a third person all that is generally necessary is that he be described with such certainty that it is impossible to mistake him for any other. Or, as it is generally expressed, there must be certainty to a common intent. Nothing more than this is required. He may, like the accused, be described by the name by which he is usually known, etc.

In *Rex* v. *Lovell* (1 Leach, 248) Lovell forged an order directing same to "Mr. Drummond, Charing Cross." Indictment charged the order drawn on Drummond and Company." On motion in arrest of judgment: Held, "and company" to be surplusage, and that "Drummond, Charing Cross," was sufficient.

In *Rex* v. *Berriman* (5 Car. & P., 601) indictment was laid in J. H. true name appeared to be J. W. H.: Held, not material if generally known by name of J. H.

In *Rex* v. *Sulls* (2 Leach, 861) indictment laying stolen goods, property of Victoria Baroness Turkheim: Held, good, although true name Selina Victorien. All that the law required was certainty to common intent. That prosecutrix always acted in and known by name of Baroness Turkheim could not be mistaken for any other.

In *State* v. *Davis* (109 N. C., 780) indictment charged marriage to Dixie Marshall. Her true name was shown to be Lee Emma Dixie Marshall: Held, to be no variance, as evidence showed she was known to defendant and others by that name.

In *Washington County National Bank* v. *Lee* (112 Mass., 521) the writ described plaintiff as "The Washington County National Bank, a corporation duly established by law, and doing business in Greenwich, in the State of New York." On the trial the plaintiff offered in evidence, to support the declaration, a certified copy of its organization certificate, in which it was described as "The Washington County National Bank of Greenwich." Gray, C. J., said:

> The plaintiff is described in the writ as "The Washington County National Bank, a corporation

> duly established by law, and doing business in Greenwich, in the State of New York." In the absence of evidence that there was any other bank of that name at that place, the evidence introduced warranted the inference that the organization proved was that of the plaintiff corporation.

In *Rogers* v. *The State* (90 Ga., 463), the indictment charged larceny from "The Central Railroad and Banking Company," while the evidence showed that the true name of the corporation was "The Central Railroad and Banking Company of Georgia."

> It also appears from the evidence that this corporation is generally as well known by one name as by the other. The question is, Was variance between the charge and the proof fatal? In our opinion it was not. * * * The indictment does inform us that it is a Georgia corporation, and the proof makes it a corporation of Georgia, etc.

It will be observed that throughout the course of the trial the court repeatedly cautioned the jury as to the legal effect and tendency of the evidence admitted; as, when the certificates (pp. 20–23) were admitted, the court instructed the jury (p. 24):

> That the certificates could only be considered upon the question whether there was a national banking association at Exeter, and as tending to show the character of business which the association was authorized to do.

II.

The seventh assignment of error (p. 72) was to the admission in evidence of the testimony of Byington, cashier of the National Granite State Bank, that King,

vice-president of the National Bank of Redemption, Boston, on which the fifteen checks above referred to, drawn by "National Granite State Bank, Exeter, N. H.," were paid, came to Exeter in May, 1893, to get additional security or collateral for the overdraft of $25,000 or $30,000 which the National Granite State Bank had in the National Bank of Redemption. It is obvious that the purpose here of the Government was to show the recognition by the National Bank of Redemption of the National Granite State Bank of Exeter by its short name, by which its checks were drawn and by which it was generally known.

III.

The eighth assignment of error is as to the testimony of C. M. Dorr, the national-bank examiner who went to Exeter, by order of the Comptroller, to take charge of National Granite State Bank, July 28, 1893.

The witness proved that he found the cashier in the front office and the president in the directors' room when he arrived. That he (witness) opened the vault and looked through the loans to see whether there were any bonds or stocks owned by the bank or as collateral to the bank missing. He said that there was one bond missing, but he didn't discover it at that time, because he went through the assets rapidly. To this plaintiff in error objected.

The bank examiner undoubtedly was there in the discharge of his business under order of the Comptroller.

The second count charged the plaintiff in error with abstracting sixteen bonds of the L. E. Railway Co. It

surely was competent for this witness to state all that his examination disclosed as to these bonds. The point at which the objection was interposed was a preliminary stage of the examination. The witness was speaking of generals before he came down to particulars.

IV.

The ninth assignment of error (pp. 73-76). It appears that Mr. Dorr, the witness for the prosecution, had a very weak and uncertain memory. He had testified previously, before the grand jury, and his testimony had been taken down. When on the trial of the case he manifested a disposition to depart somewhat from the testimony he had given to the grand jury, and to impart quite a different complexion to the case of the Government, by forgetting some very important features, to which he had previously testified with great fullness.

Counsel for the Government announced to the court that he was taken by surprise by the course pursued by the witness, and for that reason proposed to ask him direct questions—leading questions. And then he asked him if he had not testified to such and such matters before the grand jury.

Counsel for the plaintiff in error objected to the course of examination.

Now, there can be no doubt of the right of counsel to cross-examine even a witness called by them, when that witness makes a statement in court directly contrary to statements he has made out of court. (1 Greenlf. on Ev., sec. 444; *St. Clair* v. *United States*, 154 U. S., 134.)

As to disclosing the proceedings had in the grand jury room, while the view at one time taken was otherwise, yet it is now well settled both in England and in this country that a witness may be asked if he had not made a different statement before the grand jury from that which he made before the trial jury, and upon his denial to show what statements he had made before the grand jury.

The rule of public policy which regards the proceedings of grand juries as privileged communications does not extend to third persons.

In *Regina* v. *Hughes* (1 Car. and Kir., 519), on the trial of an indictment for perjury committed in giving evidence before the grand jury, it was held that a person who was present as a witness in the same matter at the same time is competent to testify to what the prisoner said before the grand jury; and that a police officer in waiting was competent for the same purpose. (*Little's Case*, 25 Gratton (Va.), 932.)

V.

The tenth assignment (p. 76) was on the refusal of the court to allow counsel for the accused to ask on cross-examination a witness called for the Government as to the number of shares of stock owned by the accused in the bank of which he was president.

The question was objected to and the objection sustained by the court, on the ground that the cross-examination must be confined to the subjects-matter of the examination in chief, and that this subject had not been gone into in chief. That if the accused desired to

examine the witness on that subject the opportunity would be thereafter afforded him in the course of the trial of calling him *as his own witness*.

Now, clearly, the judge presiding at the trial must be left to the untrammeled exercise of his judicial discretion as to the order of examination of witnesses and conduct of the proceedings. The accused was deprived of no right. For if this witness was competent to testify on that subject, and the subject was relevant to the issue, the fullest opportunity would have been allowed him of calling the witness at the proper time and putting him on the stand.

VI.

The eleventh assignment (p. 78) was to the admission by the court of the testimony of one of the directors of the bank as to an order made by the board of directors of the bank, which was not recorded in the minutes of the board, but which was known to the accused, who was president of the bank, that no one but the cashier should have authority to draw checks on account of the bank.

If the accused was charged with fraudulently appropriating the moneys and funds of the bank by means of checks drawn by him, the fact of such unrecorded order of the board, and of his knowledge of it, was clearly relevant to the issue as bearing on the question of intent.

VII.

The twelfth assignment of error is to the refusal of the court to direct a verdict for the defendant on the seventh count.

The seventh count charges an offense to have been committed in New Hampshire. It appears (p. 18) that the district attorney had served on counsel for accused a statement, which was accepted as a bill of particulars, advising him that the accused would be tried on the seventh count for the appropriation of certain sums of money by means of ten checks, dated in January and April, 1893, drawn to the order of the American Loan and Trust Company, of Boston, on the National Bank of Redemption, and five checks drawn to the order of H. N. Smith on said bank. It was insisted for the accused that the entire transaction in which those checks figured took place in Massachusetts and not in New Hampshire.

The court left the whole matter of fact to the jury, bringing to their attention section 731, Revised Statutes of the United States, providing that where an offense against the United States was begun in one district and completed in another, the offender may be tried in either; and charging them to inquire whether, although this offense may have been begun in Massachusetts, it was not completed in New Hampshire. The evidence on this subject is found on pages 37–39, inclusive.

Byington, the cashier, testified (p. 39) that he had seen two of these checks in the National Granite State Bank at Exeter, about the 1st of February, 1893, showing that, although dated Boston, they certainly had been in New Hampshire, and in all probability were actually drawn there.

But certainly it cannot be said that on the question raised by this assignment there was no question of fact

for the jury, that the evidence was so conclusive and undisputed as to have required the court to set aside any verdict found against the defendant, because of the insufficiency of the testimony to support it.

It would not, therefore, have been proper for the court, on the case presented by the record here, to have directed a verdict for the defendants; and as the assignment of error is only to the refusal of the court to grant such a motion, it is needless to consider further the grounds on which the motion was rested.

VIII.

The seventeenth assignment of error is to that portion of the charge of the court which relates to the question of jurisdiction.

This has been already considered under the seventh point.

IX.

The eighteenth assignment is to the refusal of the motion of the defendant in arrest of judgment and is already covered by the questions heretofore considered.

By an order entered October 4, 1894 (p. 16), the indictment was remitted to the circuit court for the district, to be held at Concord, N. H.

RECORD NO. 574.

After the indictment was remitted to the circuit court, the case proceeded therein to verdict and final judgment. The sentence (p. 2), entered January 31, 1895, was as follows:

> Upon the verdict under the second count of the indictment, it is ordered that the respondent be

> imprisoned in the State prison at Concord for the period of five years; and while imprisoned in the State prison at Concord he shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State of New Hampshire, in which such State prison is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State, and stand committed until sentence be performed.

Upon the verdict under the seventh count the sentence was the same. The sentence proceeds:

> Ordered: That the imprisonment under the seventh count be concurrent with the imprisonment under the second count.

It is assigned for error (p. 12)—

> that the court could not legally sentence the defendant to imprisonment in the New Hampshire State prison—

because—

> that under the laws of the United States and the State of New Hampshire persons convicted of offenses against the laws of the United States could not properly be sentenced to confinement in said New Hampshire State prison unless "hard labor" were annexed as part of the sentence; and that "hard labor" was not and could not rightfully be annexed to the sentence in this case, which is imposed under section 5209 of the Revised Statutes of the United States.

Section 5209 provides that every person convicted of a violation of this section "shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

ARGUMENT.

In *Ex parte Karstendick* (93 U. S., 398), Mr. Justice Waite, after reviewing the law as enacted in the several sections of the Revised Statutes, sections 5539, 5440, and 5541, said:

> If the sentence of imprisonment shall be for a longer term than one year the court passing the same may order it to be executed in any State jail or penitentiary within the district or State where said court is held. (Sec. 5541.) And the criminal so imprisoned shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated, and shall while so confined therein be exclusively under the control of the officers having charge of the same under the laws of the State. (*Ex parte Wilson*, 114 U. S., 421; *Mackin* v. *United States*, 117 U. S., 352.)

The laws of the State of New Hampshire, whatever they may be in this regard, can have no effect here.

HOLMES CONRAD,
Solicitor-General.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 573.

WARREN F. PUTNAM, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

~~BRIEF FOR PLAINTIFF IN ERROR.~~

Petition for Rehearing.

FRANK S. STREETER,
Of Counsel for Plaintiff in Error.

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v.

THE UNITED STATES.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

To the Honorable the Justices of the Supreme Court:

The plaintiff in error in the above entitled cause prays that the court will rehear and reconsider the matter contained in said writ of error upon which said court heretofore, to wit: on the 3d day of February, 1896, were equally divided in opinion and by reason thereof ordered the judgment of the court below affirmed. His reasons for making this request are stated below:

First. Because the judgment of the Circuit Court sentencing the respondent to imprisonment in the state prison at hard labor for a term of years cannot legally be affirmed by an equally divided court. The legal presumption of his innocence still protects him.

Second. Because this is the first term of the pendency of the case in this court, at which no oral arguments have been made, and the case ought not to be disposed of, by an equally divided court, adversely to the respondent, without oral argument, and on a further investigation by the full court. Under these circumstances it is reasonable to suppose, at least, that a rehearing might be of some assistance to the court.

Third. Because no opinions were delivered; so that it is impossible for the plaintiff in error to point out specifically any other mistakes than those above indicated, if any exist, by which the court or any member thereof may have been misled to the prejudice of the respondent.

FRANK S. STREETER,
Counsel for Plaintiff in Error.

The undersigned counsel for the plaintiff in error certifies that the foregoing petition for a rehearing is made in good faith and not for the purpose of delay, and that in his opinion the said petition is well founded on the law and facts of this case.

FRANK S. STREETER,
Counsel for Plaintiff in Error.

SUGGESTIONS ON THE FOREGOING POINTS.

A REHEARING SHOULD BE GRANTED.

I.

Because the judgment of the Circuit Court sentencing the respondent to imprisonment in the state prison at hard labor for a term of years cannot legally be affirmed by an equally divided court. The legal presumption of his innocence still protects him.

The jury in the court below returned a verdict of guilty against the present plaintiff in error. At the trial he duly took exceptions to certain evidence which, it seemed to him, was incompetent, as well as to certain instructions of the court, which seemed to be contrary to law; and these exceptions thus formally taken and preserved formed the basis of this writ of error.

It is unnecessary to argue that if the trial court erred in its admission of incompetent and prejudicial evidence, or in its instructions to the jury, the prisoner did not have that fair and impartial trial to which he was constitutionally entitled. He was entitled to have questions of law, as well as questions of fact, relating to the prosecution against him determined by the appropriate tribunal. And until those questions of law are settled by being judicially considered and determined by the court of last resort, it is difficult to see how the original presumption of his innocence of the crime charged in the indictment has been overcome, or why the same presumption does not protect him in this court. For the effect of the verdict and judgment was nothing more than this: If the rulings of the court were correct he was guilty, otherwise not. That is to say: On the assumption that the court was correct in its rulings, which were duly excepted to, the presumption of innocence was overcome; but if the exceptions were valid, then that presumption stands unimpeached and unqualified; and, in case of a new trial, he would still be presumptively innocent.

Whether those rulings were correct or not, was the vital question raised on the writ of error; and upon its determination depended the question of the prisoner's innocence or guilt. But since the court has not determined the primary and fundamental question of the validity of the rulings of the court below, the plaintiff's guilt is not established and the presumption of his innocence must prevail.

If, instead of a presumption of innocence, the rule of law were that a prisoner on trial is presumed to be guilty, then after verdict of guilty subject to exceptions, an equally divided court might consistently affirm the judgment, the prisoner being presumptively guilty. But when a respondent is before the court as an innocent man it is not apparent how he can be condemned and sentenced as a felon, in the absence of any actual judicial determination of the questions on which his guilt depends. If the justices are equally divided on the questions of law raised in a criminal case, on a writ of error, in justice to the prisoner and for the protection of the innocent, the order should be, "judgment reversed."

And it is suggested that this may be one reason why, after a somewhat diligent search in the reported decisions of this court, no case has been found where a judgment on conviction of a crime in a lower court has been affirmed here, when the justices were equally divided.

Numerous civil cases are reported where under such circumstances the judgment of the lower court has been affirmed. It is therefore significant that no criminal case has been disposed of in that way: and the absence of such a case is almost as conclusive proof, as a formal authoritative decision would be, that there is a distinction between a civil and a criminal suit which precludes the affirmance of a judgment in the latter without a consideration of its merits.

Admitting that the technical question in civil suits is whether the judgment shall be reversed, and that if the justices are equally divided no affirmative action can be taken (*Durant* v. *Essex Co.*, 7 Wall. 107, 111), is the same rule to be applied in criminal cases in view of the peculiar and far-reaching protection which the law has for hundreds of years thrown around persons accused of crime? Is the liberty of subjects to be jeopardized and their persons to be imprisoned for long terms of years, because in technical language they may be asking for some affirmative action on the part of the court? Is a person claiming to be innocent of a crime charged against him to be condemned, because he asks a court to determine whether he is guilty?

He may technically seek to have a judgment against him reversed on a writ of error, because that is the prescribed method of procedure; but what he practically asks is, that the court will determine whether he is guilty or not; whether the presumption of his innocence has been legally overcome; and until that question is solved he is presumed to be innocent and cannot be adjudged guilty.

In a civil action there is no question of innocence or guilt in the criminal sense. There is no presumption that protects the defendant. He cannot say "the law assumes that I am not indebted to the plaintiff or that I am not liable to him in damages," any more than the plaintiff could insist on the opposite assumption. There is no

presumption one way or the other. The rule that the burden of proof is on the plaintiff is a method of procedure—not a legal presumption for the protection of the defendant. No judge would charge the jury in a civil action that there was a presumption that the defendant was not liable, while in a criminal case he is obliged, in all jurisdictions where the common law prevails, to instruct them that the respondent is in law presumed to be innocent of the offence charged against him. And that legal presumption remains until all questions, both of law and fact, upon which his guilt depends, are finally decided. But in this case certain material questions, legally and properly raised, have not been decided, because, as it is said, they cannot be decided. The inability of the court, however, to decide the case, ought not to operate to the prejudice of the presumptively innocent respondent. That shield should, and, it is submitted, it does, protect him in this court, as it has protected him ever since this prosecution was commenced.

It should also be observed that since the government in a criminal case does not have the right to exceptions, the trial courts frequently rule on questions of evidence, and in charging the jury, in favor of the prosecution, so that the disputed points of law may be raised by the respondent and the judgment of the appellate court be obtained. *Pro forma* rulings of this character are made every day, often with the express assent of the respondent. This common practice indicates what the understanding of the courts, as well as of the profession, has been, as to the result in case the court above were equally divided: for if it had been supposed that a *pro forma* ruling would in such a case result disastrously to the respondent, counsel would have always objected to such rulings, and insisted on an actual and intelligent decision. *Pro forma* rulings in criminal cases would be unknown, because dangerous and absurd.

II.

Because this is the first term of the pendency of the case in this court, at which no oral arguments have been made, and the case ought not to be disposed of, by an equally divided court, adversely to the respondent, without argument and a further investigation by the full court. Under these circumstances it is reasonable to suppose, at least, that a rehearing might be of some assistance to the court.

Technically this may not be a ground for a re-hearing. But in view of the importance of this case to the respondent, it does not seem to be unreasonable that a further opportunity should be granted to him to present his arguments before the court, and that the court should reconsider the case. For it may be that upon further argument and a more careful consideration of the case, a different result might be reached. In the recent and somewhat famous Income Tax cases, on May 8, 1895, this court announced that on three of the questions submitted, the justices were equally divided; but a rehearing was granted, when upon further argument before

the full court, a decision of those questions was reached by a majority of the court.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S. 429.

In *Brown* v. *Aspden*, 14 How 26, where the question of practice upon rehearing is carefully considered, the court say:—

"It is true that the decree of affirmance in this court, in the case before us, was upon an equal division of the members composing the court at the time of the argument, eight being present. But the case was fully heard, more than a week being occupied in the arguments of counsel. And when, upon conference and full interchange of opinion, it was found that the court was divided, the case was held over until the present term, in order that each member of the body might have an ample opportunity of investigating the subject for himself. This has been done. And when the court reassembled, it was found that the opinion of each member of the tribunal was unchanged, and the decree was therefore affirmed by a divided court. Further arguments would be mere waste of time, when opinions have been formed after so much argument and such deliberate examination."

In *Baker* v. *Lee*, 8 H. L. Cas. 495, the Lord Chancellor said,—

"Had any important question of law been involved I should have strongly urged a second argument before a greater number of peers instead of acting on the maxim which guides this House upon an equality of votes, '*semper praesumiter pro negante.*'"

If in civil cases courts are slow to act when equally divided, if they will in effect invite a second argument in order to avoid a miscarriage of justice, it would seem that in a criminal case where the life or liberty of the respondent is threatened, they would be even more anxious to reconsider the case, and have the questions involved decided by a majority vote.

The simple fact that the court is equally divided in this case shows conclusively that there is some serious question of law which the respondent has raised, and upon which his guilt depends. And since at the first term, four eminent judges hold against him on this question, and four equally eminent judges hold with him, it is highly probable that on a rehearing doubts would be removed in the minds of one or more of the judges, and justice would be done by a majority decision on the merits of the appeal. Indeed we venture the suggestion that when a case is considered at the first term without the aid of oral arguments, and the result is an equal division of the court, it can hardly be supposed that further investigation would be of no use to any member of the court. Such a result at the first conference or at the first term would seem to suggest the importance of further argument and investigation. If this case had been thoroughly argued and had been continued to another term "in order that each member of the body might have an ample opportunity of investigating the subject for himself," and still the court remained equally divided, it might be said to be a waste of time to reopen the case for further argument. That was the ground upon

which a rehearing was denied in *Brown* v. *Aspden*, *supra*,—a civil action. The irresistible inference from the opinion in that case is that if the situation of the case had been like the present situation of this case, the result would have been just the opposite, and the rehearing would have been granted, so that that case is an authority for our position here.

Moreover, the importance of the questions raised and the serious consequence to the respondent on an affirmance of the judgment of the circuit court, seem almost to demand in the interest of justice that he be given not only a rehearing, but a rehearing before the full court; so that there shall be no further failure of justice by reason of an equally divided court. While the respondent has no constitutional or statutory right to be heard by the full court, yet when eight justices cannot decide the questions raised, it would be judicious, if convenient, to submit the case to the nine justices, as was done in the Income Tax cases.

III.

Since the court, following the practice in civil cases, gave no opinions, we have not been able in the motion for a rehearing in this case to indicate what particular exceptions we desire to reargue. The respondent is entirely in the dark as to the precise point or points upon which the court was divided, or upon which counsel might be of assistance to the court. Under these peculiar and embarrassing circumstances he can only ask generally for the opportunity to again present his case to the court, believing he can do so more intelligently and convincingly than he did before.

FRANK S. STREETER,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

WARREN F. PUTNAM, *Plaintiff in Error*,
v.
THE UNITED STATES.
} No. 573.

Comes now the plaintiff in error, by his attorney, Frank S. Streeter, and says:—

That on, to wit, the sixth day of September, 1895, at the request of the sureties upon his bond, he surrendered himself to the United States Marshal for the District of New Hampshire, at Manchester, New Hampshire, before John T. Crawford, a United States Commissioner; that on, to wit, the twelfth day of September, 1895, after hearing before Hon. Edgar Aldrich, district judge, an order was made by the United States Circuit Court for the District of New Hampshire, remanding the plaintiff in error to the custody of the United States Marshal for said district; that on, to wit, the thirteenth day of September, 1895, the said marshal placed the plaintiff in error in the county jail for the county of Rockingham, state of New Hampshire, situated at Exeter, in said state, where he is now detained pending the decision by this honorable court of the questions arising upon the writ of error.

Wherefore the plaintiff in error prays this honorable court that it will speedily consider his motion for a re-hearing filed herewith; and if said motion for a re-hearing shall be granted, that an early date may be set for argument, in order that a final determination of the case may be reached as speedily as may be consistent with the effectual administration of justice.

WARREN F. PUTNAM,
By his attorney, FRANK S. STREETER.

STATE OF NEW HAMPSHIRE,
COUNTY OF MERRIMACK, ss.

Personally appeared Frank S. Streeter, and made oath that the facts stated in the above motion are true,

Before me,

ALLEN HOLLIS,
Notary Public.

Concord, N. H., February 27, 1896.

[SEAL.]

Office Supreme Court U. S.
D.
MAR 19 1896
JAMES H. KENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 573.

WARREN F. PUTNAM, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR ON REHEARING.

FRANK S. STREETER,
Of Counsel for Plaintiff in Error.

CONCORD, N. H.:
REPUBLICAN PRESS ASSOCIATION.
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v.

THE UNITED STATES.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR, ON REHEARING.

By Frank S. Streeter, of Counsel for Plaintiff in Error.

By the order of the court of March 9, 1896, permission was granted counsel to submit further briefs within ten days on the questions (1) whether there was any error in respect of the testimony taken before the grand jury; and (2) whether there was any want of jurisdiction in the court. Availing ourselves of this indulgence on the part of the court, we desire to submit the following brief argument on the points above suggested, in addition and supplemental to, the former brief furnished in this case in behalf of the respondent. The limited time allotted for this purpose renders a lengthy or exhaustive argument impracticable at this time.

I

The use of the testimony taken before the grand jury as permitted by the court, during the examination of Mr. Dorr, was improper and prejudicial to the respondent; and was therefore error.

First. *The recollection of the witness could not be legally refreshed in this way.*

Counsel for the prosecution during the course of his examination of the witness stated that he was surprised at the answers received,

and desired to put a leading question, saying, "I have his testimony before the grand jury, and I wish to ask him if he did not testify to certain things before the grand jury." Against the objection of the respondent's counsel this method of procedure was permitted, and the prosecuting attorney was allowed to ask certain questions, while referring to minutes and apparently reading therefrom for the purpose of putting the questions. The object of this examination, as asserted by the district attorney and as allowed by the court, was to refresh the recollection of the witness. And it was claimed that this was a matter within the discretion of the court to which no exception would lie. (Record, pp. 74, 75.)

While it is evidently within the discretion of the court to allow leading questions to be put to a witness, on his direct examination, in order to recall certain facts to his mind, which he may then remember, the manner in which this may be done is not wholly within the final determination of the trial court, and is a proper subject of exception. Otherwise counsel under such circumstances might be allowed to privately instruct the witness while on the stand, and resort to various other devices, in order to obtain such testimony as he desired, to the perversion of the rules of evidence and in violation of the rights of parties. Hence, whether a given method of examination for the purpose of refreshing the memory of a witness is correct or not, is a question of law, which may be raised by exception, as the almost innumerable cases in which such questions have been carried to courts of last resort incontrovertibly show. It is therefore submitted without further argument, that the respondent had the right to except to the above ruling of the court, on the ground that this manner of refreshing the memory of the witness was improper and illegal.

It was improper and illegal,—

(a) *Because the witness was not allowed to examine the minutes and state whether he remembered the facts independently of the minutes.*

If it is not necessary in such cases that the minutes or memoranda which it is proposed to submit to the witness for this purpose were actually written by the witness, it is necessary that he should have an opportunity to inspect them, and state that he knew they were correct when they were written and that he now has an independent recollection of their truth: for it is not the memoranda, but his recollection revived thereby, that is evidence.

A witness may use a memorandum to refresh his recollection, although it was not made by himself, if he saw the paper while the

facts therein stated were fresh in his recollection, and he can say that he then knew they were correctly stated.

Coffin v. *Vincent*, 12 Cush. 98;
Com. v. *Ford*, 130 Mass. 64.

"It is sufficient that he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts, if thereby called to his recollection." Rice, Evidence, 748.

(b) *Because the witness did not know that the minutes were true.*

The district attorney said he had in his hand the minutes of the testimony before the grand jury. But the witness did not state what they were, nor did he testify that they were true. In fact, he knew absolutely nothing about their character or their truthfulness. He was told that they contained the minutes of his testimony on another occasion, evidently taken by some third party without his procurement, not submitted to him at the time nor at any other time, and of the truthfulness of which he had not the least information or means of judging. If they had actually been put into his hands and he had been asked to examine them, he would have been absolutely unable to say that he knew they were true at the time they were made, or that his recollection in regard to the facts therein related was so far revived that he could testify respecting them.

The rule on this subject has been well stated as follows:

"A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction, concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was then fresh in his memory.

"The witness may also refer to any such writing made by any person and read by the witness within the time aforesaid, if when he read it he knew it to be correct." (Steph. Dig. art. 136.)

Greenleaf (Evidence *s.* 436, 15th ed.) says:

"Where the witness neither recollects the fact nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; a witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said."

In *Bradley* v. *Davis*, 26 Me. 45, 54, the court say in regard to the testimony of two witnesses to whom certain memoranda had been shown:

"The amount of their testimony on this point is, that those entries were believed to be truly made; and the books containing them were produced in court. The entries of the items, however, of the account with the defendant were not made by either of those witnesses; and they have not sworn that they saw the entries made, or that they saw them immediately after or near the time they were made; and they both say that they could not be sure of the time the defendant left in May, 1837, except from what appears in the books. They, of course, have perfect confidence in the correctness of the books, and we may feel no doubt that they contain the truth; but unless they were legally admissible to establish the facts to be inferred from them, they must be considered as out of the case. They do not seem to come within the rule, that memoranda, made at or about the time of an event, concerning which testimony is wanted, may be used to refresh the recollection of a witness; for the books do not enable the witnesses to testify from recollection. Nor within the rule, that where a witness is shown a writing, which he recollects before to have seen, when the transaction stated in it was within his recollection, and he then knew it to contain the truth. The testimony of neither of the witnesses is to this effect, and is therefore merely hearsay. Mr. Greenleaf states as a third rule, that 'where the writing in question neither is recognized by the witness, as one which he remembers to have before seen, nor awakens his memory to the recollection of anything contained in it; but, nevertheless, knowing the writing to be genuine, his mind is so convinced, that he is, on that ground, enabled to swear positively to the fact,' he may testify to it. If this rule be adopted according to the import of its terms, it would seem to render the positive testimony of the witnesses in this case as to the time when the defendant left the Tremont House, admissible as legal evidence, for they doubtless knew the books to be genuine. But the case *Rex* v. *St. Martin's, Leicester*, 2 Adol. & El. 210, cited in support of the proposition, is to the effect only, that a witness may have recourse to a writing, perceived by him to be in his own handwriting, to refresh his recollection. This, and the other cases alluded to by Mr. Greenleaf, under this head, would seem to limit the generality of his proposition, and confine the operation of the rule to cases in which a person could recognize the genuineness of his own handwriting, without being able to recollect ever having made it, or the purpose for which it was made; and to testimony as to facts necessarily inferable from it."

See also *Morris* v. *Leachman*, 68 Cal. 109;
Acklen v. *Hickman*, 60 Ala. 568;
Glover v. *Hunnewell*, 6 Pick. 222.

(c) ***Because the statement of the witness which it is claimed he gave before the grand jury was not made at or about the time the facts related occurred.***

The testimony of the witness before the grand jury related to

transactions which occurred some months prior to the finding of the indictment. It was not a statement of facts which took place at the time the statement was made or about that time, but long prior thereto. It was not competent, therefore, to attempt to refresh the witness's recollection by means of his testimony before the grand jury. Even if the minutes had been put into the witness's hands, and he had discovered that they contained a verbatim account of his testimony at that time, they could not be used to revive his faulty memory, because they would contain only his recollection at that time of a conversation he had with the respondent months before. It would not be his account of what was said when the facts were fresh in his mind, but when they were dim and obscured by time. Such a statement could only be used for the purpose of contradicting the witness, not for the purpose of bolstering up and fortifying his testimony on a subsequent hearing.

In *Morris* v. *Leachman*, 68 Cal. 109, it was held that a witness cannot refresh his memory from an affidavit previously sworn to and subscribed by him *ex parte*, unless it be shown that the affidavit was written by him or under his direction at the time the facts occurred or immediately thereafter, or at some other time when the facts were fresh in his memory, and that he knew the same were correctly stated therein.

"The memorandum being made at a time when the facts written down were fresh in the mind of the witness, and known by him to be as recorded, a reference to it by the witness for the purpose of refreshing his recollection was properly permitted." *Chamberlin* v. *Ossipee*, 60 N. H. 212.

In *Maxwell* v. *Wilkinson*, 113 U. S. 656, 658, Mr. Justice Gray announced the principle for which we contend in the following language:

"It is well settled that memoranda are inadmissible to refresh the memory of a witness, unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh in his memory. The memorandum must have been 'presently committed to writing,' Lord Holt in *Sandwell* v. *Sandwell*, Comb. 445; S. C. Holt, 295; 'while the occurrences mentioned in it were recent, and fresh in his recollection,' Lord Ellenborough in *Burrough* v. *Martin*, 2 Camp. 112; 'written contemporaneously with the transaction,' Chief Justice Tindal in *Steinkeller* v. *Newton*, 9 Car. & P. 313; or 'contemporaneously or nearly so with the facts deposed to,' Chief Justice Wild (afterwards Lord Chancellor Truro) in *Whitfield* v. *Aland*, 2 Car. & P. 1015."

See, also, authorities before referred to.

We will submit this part of the argument with the suggestion that we do not believe that a single case of any authoritative importance can be found, where a witness has been allowed to refresh his recollection from memoranda, not made at or about the time the facts related therein occurred, and not known to him, or to anybody else, to be true. Such a practice would afford a most remarkable means of introducing purely hearsay evidence, founded on other hearsay evidence, not verified by any one, and entirely disconnected with the transaction to which it relates, and not being in any exaggerated sense even a part of the *res gestae*. Under such a ruling, a written report of an event made by one man years after its occurrence from memory might, at a still later period, be made the basis of the testimony of another man, who was unable to recall the facts related, except by referring to the document purporting to be a report, which may or may not be true, and which assumes to record facts not then fresh in the writer's recollection. The absurdity of this conclusion conclusively proves the error which we contend the court committed in this case.

Second. *The conduct of the district attorney in producing the testimony taken before the grand jury, in reading from it, and in asking the witness if he did not so testify before the grand jury, was grossly improper, and rendered the trial an unfair one.*

If the recollection of the witness might legally be refreshed from the minutes of his testimony before the grand jury it was unfair to read those minutes or selections from them in the presence of the trial jury. If after being duly authenticated and proved they had been offered as testimony for the jury to consider they would have been promptly rejected without discussion. Why? Because they were incompetent as proof on any issue involved, and would operate to the prejudice of the respondent. But if they could not be introduced regularly, will it be claimed that their contents, or so much thereof as served the government's purpose, might be legally brought to the attention of the jury in an irregular way, under the guise of improving the witness's memory?

Mr. Branch asserted in the presence of the jury that he had before him the minutes of testimony taken before the grand jury and referring to those minutes and apparently reading from them for the purpose of putting questions, asked:

"Do you now recollect that you testified before the grand jury that when you discovered those bonds were gone you went to Boston and learned that Mr. Putnam had them and that he acknowledged to you he had those bonds on the third day of August?"

The witness replied that "if it is a matter of record I suppose that it is so."

Again, Mr. Branch asks:

"Let me refresh your recollection a little further. Did you testify before the grand jury that you said to him something about the bond, and he said, 'Mr. Dorr, I will state to you I am not going away?'"

Answer. "Yes, sir; I did."

And still again Mr. Branch asks:

"And did he not say, 'I will get the bonds for you as soon as I can?'"

Answer. "Yes; I can assert to that."

(Record, pp. 74, 75.)

During this examination Mr. Branch was reading from minutes, which he had told the jury were taken in the grand jury room, such parts at least of the above questions as purport to be quoted.

It is not of much consequence what the answers of the witness were. The mischief consisted in the unsworn statement of counsel as to the character of those minutes and their contents. He stated to the jury what no witness under oath would have been allowed to state, and thus introduced this incompetent evidence without the sanction of an oath and not subject to the test of cross-examination.

If he had handed the minutes to the witness for the purpose of refreshing his memory, and then had proceeded regularly with his examination, the unfairness of the trial would not have been so apparent. The inevitable impression on the minds of the jury must have been that the witness had stated before the grand jury such facts as the counsel was apparently reading from the minutes. They knew that that evidence was given under oath and was of as high a character as the testimony of the witness on the stand, and they might have had an idea that it was entitled to greater credit. But it is useless to speculate as to the effect this kind of testimony in fact had on the jury. It is sufficient to know that it was improperly and illegally laid before the jury. Counsel acting as such cannot testify at any stage of the trial, though the question has usually arisen during the argument.

"It is scarcely necessary to suggest that in every judicial trial, a party must present his evidence either by the testimony of witnesses who are under oath, by the exhibition of documents which are competent under the rules of evidence, or by the exhibition of such

material objects as are connected with the *res gestae* and speak with reference to the issues on trial. He cannot be permitted to present his evidence in the form of the argument of his counsel to the jury, who is not sworn to speak the truth as a witness in the particular case. All courts, therefore, unite upon the conclusion that where counsel, in their argument to the jury, make statements of prejudicial matters which are not in evidence, it will afford ground for a new trial, unless the error is cured before the cause in finally submitted to the jury."

1 Thompson, Trials, *s.* 963;
Rolfe v. *Rumford*, 66 Me. 564.

In *Brow* v. *State*, 103 Ind. 133, the prosecuting attorney in argument said, he knew the respondent was guilty. A new trial was granted on this ground, the court saying, "The defendant as was his right contested the question of his guilt. In this contest it was incumbent on the state to establish its accusation against him by evidence admitted through the legitimate channel. It had no right to ask for a conviction upon assertion, or evidence from any source not thus admitted. Upon the evidence as it stood it was not only a fair question of debate, but a question of fair debate, whether the defendant's guilt was made out, and it was in the highest degree unfair that the attorney for the state put the weight of his own personal knowledge into the scale, in the manner set forth, to overbalance the defendant's case."

"When counsel are permitted to state facts in argument and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said in answer to these views that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force according to circumstances; and if they in any degree influence the finding, the law is violated, and the purity and impartiality of the trial are tarnished and weakened. If not evidence, then, without doubt, the jury have nothing to do with them, and the lawyer no right to make them. And just here the argument might be rested. It is not reasonable to believe that the jury will disregard them. They may struggle to disregard them; they may think they do disregard them, and still be led involuntarily to shape their verdict under their influence . . . To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath—without cross examination, and irrespective of all those precautionary rules by which competency is tested."

Mitchum v. *State*, 11 Ga. 615, 634.

"Facts of which no proof is offered and no presumption arises are legally outside of the case, and cannot be brought before the jury under any pretense whatever."

Union Ins. Co. v. *Cheever*, 36 O. St. 201, 210;
Koelges v. *Ins. Co.*, 57 N. Y. 638.

In *Brown* v. *Swineford*, 44 Wis. 282, 292, it is said that the weight of authority supports "the rule now adopted by this court, that it is error sufficient to reverse a judgment, for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case when they are not. Some of the cases go further, and reverse judgments for imputation by counsel of facts not pertinent to the issue, but calculated to prejudice the case."

In *Martin* v. *Orndorff*, 22 Ia. 504, plaintiff's counsel in the course of his argument "commenced reading the minutes of the evidence taken at the previous trial, and which was not introduced in evidence . . . to which defendant objected; but the court permitted the reading as a part of the counsel's argument . . . to all of which defendant excepted."

The jury were instructed "not to consider anything read from the minutes of the evidence at the former trial."

But it was held that the error was prejudicial.

"And it is improper for one occupying the position of the prosecuting officer to make a statement to the jury of a fact, as of his own knowledge, which has not been introduced in evidence under the sanction of an oath, relating to the material issues of the case."

People v. *Dane*, 59 Mich. 550;
Hoxie v. *Ins. Co.*, 33 Conn. 471.

In *Commonwealth* v. *Fox*, 7 Gray 585, a witness who was unable to read and write, being called for the Commonwealth, omitted to state some facts to which she had testified at the coroner's inquest. The attorney general, for the purpose of refreshing her recollection, offered to read her statement, as then reduced to writing by the coroner, and signed by mark of the witness. Counsel for the defendant objected that the statement should not be read in the presence of the jury, because it could only be used as a memorandum to refresh the recollection of the witness. And the court so ruled, and ordered that the witness should withdraw with one of the counsel on each side, and that the paper should be read to her by them, without comment, and that she should then return and proceed with her testimony.

The case of *Bushford* v. *People*, 24 Mich. 244, is very similar to the case at bar. The prosecution, under the pretence of refreshing the recollection of a witness, was allowed, against the objection of the prisoner, to read in the presence of the jury the witness's evidence given on another occasion, and then to ask him whether he recollected certain facts stated in it. And this was held to be reversible error.

The following quotation is taken from the opinion of Doe, C. J., in *Baldwin* v. *Grand Trunk Railway Co.*, 64 N. H. 596, 597:

"Kilpatrick, a brakeman on the train that ran over Waldron, was not called as a witness by either party at the trial. On the cross-examination of Gonyea, the engineer of that train, the plaintiff's counsel, holding up a paper, asked, 'Do you know Kilpatrick's handwriting?' The witness replied that he did not. The plaintiff's counsel then said, 'He gave his statement, and has since been discharged by the Grand Trunk Railway Company, has n't he?' This was one way of informing the jury that the exhibited paper contained Kilpatrick's written statement; that it was adverse to the defendants; and that for this reason Kilpatrick had been discharged by them. The objection to this unsworn testimony was not avoided by the interrogative form of words. The substance was inadmissible. The effect of the testimony was intensified by the declaration that if the defendants objected to the so-called question, the plaintiff would waive it. This method of increasing the force of incompetent evidence is illustrated by the case supposed in *Bullard* v. *B. & M. Railroad*, 64 N. H. 27, 35, and nothing need be added to the decision of that case. A judicial trial means a fair trial. The court has no discretionary power to compel a party to submit to a trial that is not fair. 'Had the plaintiff's whole case been proved in the same way (by the unsworn testimony of his counsel), the error, although extended in fact over more ground, would not have been raised to a higher degree of illegality.' The wrong was not rectified, the error was not acknowledged, the testimony was not withdrawn, and the plaintiff did not obtain explicit instructions from the court to the jury to disregard it."

In view of the above case and others it is very evident that the improper practice of counsel, which is the subject of this exception, would not be tolerated in the courts of New Hampshire.

See *Bullard* v. *Railroad*, 64 N. H. 27;
Hilliard v. *Beattie*, 59 N. H. 462;
Cross v. *Grant*, 62 N. H. 675;
Tucker v. *Henniker*, 41 N. H. 317;
Noble v. *Portsmouth*, 30 Atl. 419;
Robertson v. *Madison*, 29 Atl. 777.

The respondent's right to a fair trial—fair because in accordance with the law of the land—is a sacred constitutional right. If it is violated in one respect it may be violated in another or be wholly abrogated. It is as important that one on trial for a crime should be

tried on legal evidence legally and regularly produced, as that he should be tried by a jury of twelve men. To prove a competent fact in an illegal way, is as serious an error as to prove an incompetent fact in a legal way. It is not material to ascertain in this case whether the fact which the district attorney was attempting to prove was competent or not; the true question is, was he attempting to prove it in a proper way?

The same principle would be involved and the same constitutional right would be imperilled, if the counsel had called a witness to the stand and had been allowed to examine him without putting him under oath. A verdict obtained on such evidence would not be permitted to stand, because of the illegal manner by which certain competent evidence was obtained. Even an instruction from the court would not cure the defect—for, "the jury may not be able wholly to free their memory or their judgment from the unfair and illegal impression made by a plausible statement of fact, which may seem to them entitled to more respect than the rule of law that excludes it."

Bullard v. *Railroad*, supra.

The principle of law violated would have been the same also, if the district attorney had been allowed to prove his entire case by reading all the minutes of the evidence before the grand jury, on which the indictment was founded. The legal error would have been no greater,—it would, in fact, have been the same. And if a verdict obtained in such a case would be no verdict in law, then the verdict in this case produced in part at least by the same kind of evidence is a nullity and should be set aside.

That the evidence thus illegally submitted to the jury was prejudicial to the respondent is so apparent as to require little comment. From it the jury might have found that Putnam acknowledged to Dorr that he had the bonds in question on the 3d day of August; that Putnam told Dorr that he was not going away, and that he would get the bonds for him as soon as he could; an admission by Putnam, if the evidence was true, that he had the bonds which he was charged with having misappropriated; a very important and necessary link in the chain of evidence by which it was sought to obtain a conviction. This evidence, therefore, was both material and prejudicial; and its reception in the illegal manner above indicated was manifest error, which can only be corrected by setting aside the verdict.

II

1. *The court erred in denying the respondent's motion to direct a verdict in his favor upon the seventh count.*
2. *The court erred in charging the jury upon the question of jurisdiction over the offences alleged in the seventh count.*

The seventh count charges that the defendant, as "president of a certain banking association," etc., "on, to wit, the first day of January," 1893, "and at various times between that date and the fifteenth of July," 1893, "at Exeter, in said district, and within the jurisdiction of this court, . . . did then and there unlawfully and wilfully and without the knowledge and consent of said association, and with intent to injure and defraud said association, abstract, and convert to his own use the monies, funds, and credits of the property of said association, to wit, forty thousand dollars of the monies, funds, and credits of said association, a more particular description of which monies, funds, and credits is to the said jurors unknown," etc. (Record, p. 7.)

The evidence produced by the prosecution in support of this count tended to prove the facts set out on pages 37, 38, and 39 of the Record and pages 88, 89, 90, and 91 of the former brief for the respondent. The crime charged in this count is the statutory crime of abstraction, and for the purposes of this argument it may be admitted that the respondent committed that offence somewhere and to the injury of somebody; but it was essential to the jurisdiction of the court below that the evidence as well as the indictment should show, that the crime was committed in the state of New Hampshire and to the injury of the National Granite State Bank at Exeter in that state. If, as the evidence seems to incontrovertibly show, the crime was committed in Massachusetts, then the New Hampshire court was without jurisdiction to try the respondent on this count and made a serious mistake in submitting the question of the respondent's guilt thereunder to the jury.

The question involved in both of the errors above suggested relates to the jurisdiction of the court, and a separate consideration of those points is unnecessary.

(a) *If Putnam had authority to draw the checks in question in the name of the bank at Exeter on its reserve in the Bank of Redemption, it is conceded that this crime of abstraction was not committed in New Hampshire, and the court was without jurisdiction thereof.*

The case was tried on this theory, and the judge in his charge stated the same in substance to the jury. And we suppose it would

not be seriously contended, that if he had authority to draw said checks, he was guilty of abstraction in New Hampshire. The question then is,—

Did he have authority as the agent and president of the Exeter Bank, to draw said checks, so as to bind that bank as against the Bank of Redemption? After he received the money on those checks, did the Exeter Bank still have a right of action against the Bank of Redemption on that account?

It is claimed that what took place in Boston had no effect on the legal rights and duties then existing between the two banks, because the Exeter bank "at a meeting had adopted a resolution providing that the president should not draw checks, and that therefore the president had no authority, and the president knew he had no authority to draw checks." Charge: Record, p. 87.

The effect and purpose of the vote, as thus interpreted by the court, was to deprive Putnam of the power he had to draw checks on the reserve fund. Having had that power, the Bank of Redemption was justified in assuming he continued to possess it, whenever he drew checks in the name of the Exeter bank on that fund, in the absence of any notice or knowledge of a revocation. But "the reserve agent was never notified of it." Record, p. 37.

Moreover, it is inconceivable that the Boston bank should honor these checks drawn by Putnam as president, if they had any suspicion that he had no authority to do so. It paid these checks honestly, relying upon the apparent authority of Putnam. Nothing had even occurred to put it on its guard in this respect, or to cause it, in the exercise of reasonable prudence, to inquire whether his authority to draw the checks in question had been revoked.

Indeed, it appears that the first check, which it is claimed Putnam had no authority to draw, was dated Jan. 17, 1893, and that the next one was dated Jan. 23, and that these checks were duly paid by the Bank of Redemption, and the Exeter bank was notified of their existence about the first of February when the reconciliation sheet came in. Record, p. 39.

On the question we are now considering, viz., whether Putnam had apparent authority to draw checks as president, as against the Bank of Redemption, it is immaterial what he said he had done with the money or whether he said anything. If he lied to the witness Byington, when he said the money was used to pay a loan to the Trust Company, his falsehood did not affect in the least the right of the Bank of Redemption to recognize his authority to draw those checks, as well as a dozen or more similar ones afterwards drawn.

It was the legal duty of the Exeter Bank, as soon as it found Putnam was assuming to draw checks in its name, to notify the Boston bank that it repudiated his signature; and its omission in this respect was equivalent to original authority which would continue, as against the Boston bank, until it was notified of an express revocation. The rights of the latter bank could not be prejudiced by the falsehood of a conversation which Putnam may have had with Byington in regard to the disposition of the money, while the Exeter bank recognized the checks as valid and binding. That consideration is quite immaterial.

It further appears from the Record, p. 38, that the rest of the checks were drawn between the first day of April and the sixth day of May, and that they were all recognized by the Exeter bank as obligatory on it as soon as they had knowledge of their existence; that during the first week in May (Record, p. 30), after twelve of the fifteen checks in question had been drawn and paid by the Boston bank, the vice-president of that bank went to Exeter and obtained from the Exeter bank additional security or collateral for the overdraft which then amounted to between twenty-five and thirty thousand dollars. At that time Putnam had made no explanation to the Exeter bank of his transactions with the Boston bank since April 1, covering eight or ten of the checks. These facts show incontrovertibly that the Exeter bank as against the Boston bank, had waived any right it may have had to insist that all its checks should be drawn by its cashier, and it would be estopped as a matter of law from insisting on that supposed right in any suit it might bring against its reserve agent for a recovery of the money withdrawn by Putnam on those checks.

The simple question is one of power on the part of Putnam as against the Bank of Redemption, and there being no dispute about the facts, it was improperly submitted to the jury. It is a question of law, and the jury should have been instructed that, if they found the facts as above set forth and as claimed by the prosecution, they should find a verdict for the defendant on the seventh count.

"Where one without objection suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion.

He is estopped to take refuge in such a defence. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases it is implied that the like business may be transacted in others. The inference to be drawn is, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same."

Bronson v. *Chappell*, 12 Wall. 681, 683.

"Where a general authority is once shown to have existed, it may be presumed to continue until it is shown to have been revoked, and persons who have dealt with the agent as such, or who have had notice of his authority, may very properly expect that if the authority be withdrawn, they will be given reasonable and timely notice of that fact, and they may therefore lawfully presume, in the absence of such notice, that the authority still continues.

"And it is therefore the general rule of the law that the acts of a former general agent within the scope of his original authority will, notwithstanding its revocation, continue to bind the former principal to those parties who have been, and still are, dealing with him in good faith in reliance upon his former authority until they have had notice of its revocation."

Mechem, Agency, *s.* 224.

"No company can be allowed to hold out another as its agent, and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority, until in some way informed of its revocation."

Southern Life Ins. Co. v. *McCain*, 96 U. S. 84, 86.

"Persons who deal with an agent before notice of the recall of his powers are not affected by the recall."

Hatch v. *Coddington*, 95 U. S. 48, 56.

See also *Johnson* v. *Christian*, 128 U. S. 374, 381;
McNeilly v. *Insurance Co.*, 66 N. Y. 23, 28;
Claflin v. *Lenheim*, 66 N. Y. 301, 305;
Morgan v. *Stell*, 5 Binn. 305;
Jones v. *Hodgkins*, 61 Me. 480, 483;
Beard v. *Kirk*, 11 N. H. 397;
Story, Agency, s. 470;
Am. & Eng. Enc. of Law, vol. I, p. 448.

The fraudulent intent or purpose of Putnam has no bearing on this question. He either had, or had not, authority to withdraw this money from the Bank of Redemption, and bind his bank by his official check. As soon as the latter bank learned that these checks had been drawn, they said or in effect admitted that Putnam had the necessary authority. They did not attempt to repudiate these transactions, and when he told them that the first two checks went to pay the debt of the bank, they were willing to accept and ratify, if necessary, what he had done. They recognized, therefore, his original authority, which he claimed to possess when he drew the checks, and would be conclusively estopped in an action against the Bank of Redemption to say, that Putnam did not have the power he claimed. In such an action it would ill become them to say, that they were willing to accept the benefit, if any, resulting from the transaction when Putnam exceeded the secret limitation on his power to draw checks, but that they had the right to repudiate such excess of authority when they received no benefit therefrom. In such a case the defendant would most certainly be entitled to judgment.

If this conclusion is correct, then no crime was committed in New Hampshire under the seventh count.

(b) *But if the Bank of Redemption was not justified in the assumption that Putnam had the right to draw these checks, and if the bank at Exeter was induced by him to give up their "credits" with the former bank, it does not appear that anything was done or said by him in the state of New Hampshire which had any tendency to bring about that result.*

If the talk he had with Byington had that effect with reference to the first two checks, it does not appear where the parties met; so far as appears, that conversation may have occurred in California.

Indeed, if the fact were important we might say, that the omission of the prosecuting attorney, apparently intended, to ask any of the witnesses where or when that conversation took place, was conclusive proof that it was not within the territorial jurisdiction of the court. But as the burden of proving that it took place in New Hampshire rested upon the prosecution, and as there is not the slightest evidence in support of that fact, it was not competent for the jury to find a verdict of guilty. It is not for us to show where Putnam and Byington were when they had that talk, but for the prosecution to show, beyond a reasonable doubt, by some competent evidence, that they were in New Hampshire. And this they have failed to do.

Will it be said that it was unimportant where this conversation occurred, that it is sufficient if Putnam had the talk with somebody, somewhere, and at some time, which resulted in some way to induce the Exeter bank to give up its "credits?" Suppose the place was in Boston; if Mr. Byington, representing the bank, and having power in the premises, was present, and was induced by Putnam's representations to withdraw the bank's "credits" in the Boston bank, then the crime of abstraction would be complete, and would be begun and terminated in Massachusetts. If the *res* was done in that state, it was not done in some other state, and a New Hampshire court can have no jurisdiction.

We also desire to suggest, under this head, that it does not appear that this talk with Byington was communicated to the directors, who presumptively had the power to release their "credits" in Boston, or that they authorized such a proceeding, or that Byington, who, as cashier merely, presumptively did not have that power, did in some way successfully exercise it. For, if it was legally impossible for Putnam to induce Byington to give up those credits, then his talk with him was harmlessly ineffectual, and therefore became entirely immaterial. Is the transaction, which on the evidence, may have occurred anywhere, the same in legal effect that it would have been if Putnam at a meeting of the directors had made the same statements, and had thereby fraudulently accomplished his alleged purpose by a vote of the board? It would seem that only a negative answer could be given to that question.

"It is scarcely necessary to say that a ratification to be efficacious, must be made by a party who had power to do the act in the first place; that is, in the present case, the board of directors; and it must be made with knowledge of material facts."

Western National Bank v. *Armstrong*, 152 U. S. 346.

Hence we insist that Byington could not ratify the act of Putnam in drawing checks, because he could not have originally given him that authority; nor could he bind the bank by agreeing to give up its credits in Boston, which had been drawn out on unauthorized checks.

(c) *If Putnam did not have authority, expressed or implied, to draw these checks, he did not injure the Exeter bank, and the crime alleged is not made out.*

Suppose Mr. A should step into a bank and falsely representing himself to be the authorized agent of Mr. B, should induce the bank to honor his check drawn on B's deposit. B would not be de-

frauded or injured in any respect,—he could still hold the bank responsible for the money so fraudulently withdrawn by A. The crime would be obtaining the bank's money by false pretenses,—not B's money.

But, to make the analogy complete, suppose on B's learning of this transaction, he should ask A about it and A should then falsely and fraudulently say, that he had liquidated a debt of B with the money so received, and thereupon B should ratify and affirm the act,—would the bank then be in any better position than before? If so, why? Could it successfully defend against an action by B on the ground that he, too, had been misled by A and, under a misapprehension of material facts, had ratified the act of A? Why should the fraud successfully practised by A upon B deprive B of the right of action which before he certainly had against the bank? If A's ratification had not been obtained by fraud, if B's representation had been true, and A had received the benefit of his money once, it is evident he could not recover it again of the bank. There would then be a ratification of the unauthorized act. But when the facts are completely reversed, we should not expect the same result to follow.

"It may therefore be stated as the general rule, that, except in those cases where the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have, any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him *with a full knowledge of all the material facts* connected with the transaction to which it relates. . . . But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act, the ratification will be invalid because founded upon mistake or fraud."

Mechem, Agency, *s.* 129.

"The general rule, in respect of the ratification or confirmation of voidable acts, is that a ratification or confirmation by the party having the power to disaffirm, in order to bind him, must take place with *full knowledge of the circumstances.* If, therefore, he assent while in ignorance of the attending facts, he may disaffirm when informed of such facts."

Thompson, Corporations, vol. 4, *s.* 5306.

"Whenever a president acts beyond the scope of his authority, the bank must be a party to the circumstances, or chargeable with knowing them, to create the presumption either of having authorized him to do them, or of having ratified them after they were done."

Bolles, Bank Officers, *s.* 303.

Story, J., in *Owings* v. *Hull*, 9 Peters 607, 629, says:

"No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud."

To the same effect, are,—

Bennecke v. *Life Ins. Co.*, 105 U. S. 355;
Western Natl. Bank v. *Armstrong*, 152 U. S. 346;
McClelland v. *Whiteley*, 15 Fed. 322.

In *Dowden* v. *Cryder*, 26 Atl. 941 (N. J. App.), it was held that if an agent transcends his authority, and commits a breach of trust, by transferring his principal's property to pay his own debt, the principal will not be claimed to have ratified the act until he has notice of the breach of trust.

See also *Combs* v. *Scott*, 12 Allen 493;
Dickinson v. *Conway*, 12 Allen 487;
Brass v. *Worth*, 40 Barb. 648, 654;
Craighead v. *Peterson*, 72 N. Y. 279, 285;
Bank of Owensboro' v. *West. Bank*, 13 Bush (Ky.) 526;
Saville v. *Welch*, 58 Vt. 683.

We still insist upon all the points taken in our former brief under these two general heads, some of which we have not had sufficient time to re-examine and elaborate.

Frank S. Streeter
Counsel for P. C.

Office Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

WARREN F. PUTNAM, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 573.

WARREN F. PUTNAM, PLAINTIFF IN ERROR,
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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

REPLY TO SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

REPLY TO SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Counsel for plaintiff in error, after filing their brief of 99 pages, discussing with great fullness each of the grounds of error assigned in the record, and after the judgment of the court was announced, obtained leave to file an additional brief on two questions:

1. Whether there was any error in respect of the testimony taken before the grand jury; and,

2. Whether there was any want of jurisdiction in the court.

The supplemental brief was filed on the 19th of March; and from pages 1 to 14 the first of the two questions is considered under several heads.

The two principal divisions being:

I.

The use of the testimony, taken before the grand jury as permitted by the court, during the examination of Mr. Dorr, was improper and prejudicial to the respondent and was, therefore, error.

Under which as a subdivision, is the following, on page 8:

> The conduct of the district attorney in producing the testimony taken before the grand jury, in reading from it, and in asking the witness if he did not so testify before the grand jury, was grossly improper, and rendered the trial an unfair one.

It is unnecessary to recite further the various headings under which this branch is further discussed in the brief of counsel. It is enough that we look now to the record and ascertain from it, if there is any, the slightest basis for the complaint urged with such heat against the ruling of the court, and for the imputation of gross impropriety in the conduct of the district attorney.

The entire proceeding will be found on pages 32–34, which will be recited here for convenience, to the end that the court may see if any ground whatever is afforded for the liberty of criticism in which counsel for plaintiff in error has indulged himself.

C. M. Dorr, a bank examiner, was on the stand as a witness for the prosecution. He had testified to a conversation he had had with Mr. Putnam and to certain bonds which Mr. Putnam had returned to him through a third person. He had stated, in reply to a question put to him by the district attorney:

> My mind has been occupied by other matters recently and this matter is not very clear in my mind, but, as I remember it, he returned a portion of those bonds to me through his father.

He was then asked the following question:

> Q. Did he ever at any time tell you what he had done with these bonds?
>
> A. Not that I now recollect.
>
> Mr. BRANCH (United States district attorney). I propose to ask this witness a leading question, because I am taken by surprise by his answer. I have his testimony before the grand jury and I wish to ask him if he did not testify to certain things before the grand jury.
>
> The COURT. You may do that.
>
> Mr. STREETER. To that I object and except.
>
> The COURT. It is a matter of discretion with the court to allow counsel on either side who say they are surprised to ask such question. It is not a matter of exception.
>
> By Mr. BRANCH:
>
> Q. (Referring to the minutes and apparently reading for the purpose of putting his question.) Do you now recollect that you testified before the grand jury that when you discovered those bonds were gone you went to Boston and learned that Mr. Putnam had them, and that he acknowledged to you he had those bonds on the 3d day of August? Did you not so testify before the grand jury?

A. If it is a matter of record I suppose that is so. Mr. Putnam done considerable of the business by letters.

Q. I am asking if you did not so testify before the grand jury?

A. If it is a matter of record I do not dispute the record.

Q. Do you not recollect that fact that you asked him what he had done with them?

Mr. STREETER. I still object and except to this, because it is the record taken before the grand jury, and should not be introduced here. It is improper, and I object to it.

The COURT. I do not think you ought to say it is improper after the court has ruled that it is.

Mr. STREETER. I beg your honor's pardon. I did not understand that you had ruled on this point.

The COURT. It is a thing often done, and when counsel say they are surprised by the way a witness recollects a thing, it is within the discretion of the court to allow counsel to direct the attention of the witness to something which may refresh his recollection.

By the COURT:

Q. Do you recollect this conversation in view of your attention being now called to it?

A. I do not recall distinctly where I had that interview, but I think it must have been at the station at Exeter.

Q. It is not a question of where it must have been, but whether you recall it now.

By Mr. BRANCH:

Q. Let me refresh your recollection a little further. Did you testify before the grand jury that you said to him something about the bond and he said, "Mr. Dorr, I will state to you I am not going away"?

A. Yes, sir; he did.

Mr. STREETER. I object to the reading here before this tribunal of the records taken before the grand jury—records of the grand-jury room—and I renew the objection which I took when my brother first put it in, two or three minutes ago. I renew the objection I then took in the production of grand-jury records before this court.

Mr. BRANCH. I am not.

The COURT. It is incompetent.

Mr. STREETER. I except.

Q. And did he not say, "I will get the bonds for you as soon as I can"?

A. Yes; I can assent to that.

The COURT. It must be understood that the putting into the question a conversation is merely done for the purpose of directing the witness' attention to the matter, and that it is not in unless the witness remembers the conversation and states it here.

Mr. STREETER. If your honor will pardon me, my exception to its being read is in the record and I don't want to be deprived of that.

The COURT. That is all right.

Now, while the district attorney stated that he had the testimony of the witness before the grand jury, and while the record states—bottom of page 32—that the district attorney "referring to minutes, and apparently reading for the purpose of putting his question," it does not appear, nor do these statements import that the paper from which the district attorney was reading was the testimony taken before the grand jury, *non constat*, but that it was a memorandum made by the district attorney himself from that testimony, which he was using to frame his questions to the witness. But, assuming that it was

the actual notes of the stenographer of the testimony of the witness before the grand jury, yet it was not for that reason a paper which the witness could use for the purpose of refreshing his memory.

It certainly was not a memorandum made by the witness himself at the time, nor was it a memorandum made by anyone else and shown to the witness at the time of his testimony and then recognized and admitted by him to be a true record of the testimony given by him. It was just as though some member of the grand jury, or some person present in the grand-jury room at the time of the delivery of his testimony by the witness, had made a memorandum of it and afterwards handed the memorandum to the district attorney. On no ground whatever, so far as this record discloses, was it a paper which with any sort of propriety could have been placed in the hands of the witness for the purpose of refreshing his memory.

The court allowed the district attorney to propound leading questions to a witness called by him, because he was taken by surprise at the testimony delivered by the witness—which was contrary to statements which he was informed the witness had previously made of the same transaction. Whether these contradictory statements of the witness were made through forgetfulness, or intentionally, the district attorney had the right, as the court recognized and allowed, to subject the witness to a course of examination in the presence of the jury to test the soundness of his memory or the accuracy of his statements. The district attorney stated to the court as the ground of his application to put leading questions that

he himself had the testimony which the witness had previously delivered, and he knew from that that the testimony he was now delivering was in conflict with his former testimony.

The grounds of objection urged by the plaintiff in error here, that the witness was not allowed to examine the minutes and state whether he remembered the facts independently of the minutes, would apply only to minutes made by the witness himself at the time of his original statement, or made by some one else at that time and immediately shown to the witness and identified by him, neither of which appeared to be the case here.

The further ground of objection urged by attorney for plaintiff in error, page 5 of his brief, that the witness did not know that the minutes were true applies also only to minutes with which the witness could properly refresh his memory. Whether the witness admitted the minutes to be true or not, if the district attorney had reason to believe that they were true he had a right to avail himself of such minutes as a guide in his examination of the witness.

Any witness on the stand who is confronted either by written or oral evidence of former contradictory statements made by him might, in the view taken by the attorney for plaintiff in error here, prevent such minutes or memoranda from being used by the district attorney on his examination by simply denying that such minutes or memoranda were true. The court had passed upon the admissibility of the evidence; it remained for the jury to determine as to its weight and sufficiency.

The further ground of objection made by plaintiff's attorney, page 6 of his brief, that the memorandum used by the district attorney was not proper for the purpose, because the statement of the witness, which it is claimed he gave before the grand jury, was not made at or about the time the facts related occurred, indicates a strange confusion of ideas in the mind of the counsel urging that objection.

The examination by the district attorney was not directed to the principal occurrence, to wit, the offense with which Putnam was charged in the indictment, but it was directed exclusively to the facts which occurred in the grand-jury room, to wit, the testimony delivered by the witness before the grand jury; and if the memorandum held by the district attorney, in his hand, was represented by him to be—and in fact was—a stenographic report of the testimony of the witness made at the time of its delivery before the grand jury, it would have been a paper from which not only might the district attorney have been guided in his examination, but it would have been one with which the witness might have refreshed his memory, and which might also, under certain conditions, have properly been laid before the jury as substantive evidence. But if it possessed none of these qualities, if it was merely a memorandum made by one of the members of the grand jury, or by a bystander, of the testimony actually delivered by the witness before the grand jury, it would have been perfectly competent and proper for the district attorney to have used it as the basis of his application to put leading questions to this

witness and to have guided him in his examination of the witness.

The whole position of counsel for plaintiff in error, in his brief, rests upon a pure assumption which is not warranted or supported by the record, to wit: That the paper which the district attorney held in his hand during his examination of this witness was such a paper as the witness had a right to demand, and which the court should have allowed him to use for the purpose of refreshing his memory.

II.

1. The court erred in denying respondent's motion to direct a verdict in his favor upon the seventh count.

2. The court erred in charging the jury upon the question of jurisdiction over the offenses alleged in the seventh count.

It will be observed that the question upon which this court has authorized this supplemental brief to be filed by plaintiff in error was, "Whether there was any want of jurisdiction in the court."

I do not understand from the assignment of error, or from the discussion of this question in the original or supplemental brief of the plaintiff in error, that the matter assigned as error went to the jurisdiction of the court.

The seventh count, page 7 of the record, charged that Putnam, being then and there present in the bank known as the National Granite State Bank, carrying on business in Exeter aforesaid, did abstract and convert to his own

use the moneys, funds, and credits of the association at Exeter, in said district and within the jurisdiction of this court.

The ground of objection is, that the checks drawn by Putnam as president of the bank, by means of which he committed the crime charged against him, were actually drawn by him in the city of Boston, in Massachusetts, and were cashed there by the National Bank of Redemption in Boston.

If this was an undisputed fact in the case—and there was no conflicting evidence which would justify its reference to a jury to ascertain the fact—still, can it be said as a matter of law that a president of a bank in New Hampshire, who goes into the State of Massachusetts and there draws a check on his bank in New Hampshire and has it cashed at a bank in Boston, Mass., with the intent to defraud his bank in New Hampshire, is guiltless of the commission of any crime in the State of New Hampshire? If that be true, then by attaching a string to a bag of gold which is in New Hampshire, and crossing the State line, he stands upon the soil of Massachusetts and draws the bag of gold from New Hampshire into Massachusetts, he can not be convicted of the commission of the crime of embezzlement in New Hampshire, because he was in Massachusetts when he took the gold into his possession.

The check which Putnam, as president, drew on his bank in New Hampshire, while he was in Boston, was but a string with which he, or the National Bank of Redemption of Boston, to whom he passed the check,

drew the funds which the check called for from the vaults of the Granite State Bank in Exeter, N. H.

But, as stated in my original brief (p. 12), the evidence as to this transaction was sufficiently conflicting to justify its reference to the jury. Byington, the cashier, testified that he had seen two of these checks in the National Granite State Bank of Exeter about the 1st of February, 1893; and it was proper for the court to have submitted to the jury the fact for their determination as to where the crime was committed, taking care to guide them as far as was necessary in his charge by instructions as to the law.

Counsel for plaintiff in error treats the matter in his supplemental brief as though it were a question between the bank at Exeter in New Hampshire and the Bank of Redemption in Massachusetts.

It is altogether immaterial what the Bank of Redemption thought or knew as to Putnam's intention, or as to the *bona fides* of the transaction. This proceeding is by the United States against Putnam for a violation of provisions of the National Banking Act; and the sole question, so far as the seventh count is concerned, is whether he did commit the crime as charged in that count; not whether the transaction occurred wholly or only in part in New Hampshire.

Many crimes may be committed in two jurisdictions. One may stand in one State and feloniously, with a gun, kill a man in an adjoining State. The crime pervades the entire transaction; and if any part of the transaction is within the jurisdiction of any one State the perpetrator may be proceeded against in that State, although

the greater part of the transaction may have been performed in another State.

I have not thought it worth while to encumber these pages, or detain the court with a display of authorities in support of these views; they are sufficiently evident and meet, I think, the positions taken in the supplemental brief.

HOLMES CONRAD,
Solicitor-General.